

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVANCED METAL
TECHNOLOGIES OF INDIANA, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AEROSPACE WORKERS, AFL-CIO

Cases 09-CA-083508
09-CA-084046
09-CA-084610
09-CA-084611
09-CA-088300
09-CA-088310
09-CA-090374
09-CA-091378

DECISION
and
RECOMMENDED ORDER

DAVID I. GOLDMAN
Administrative Law Judge

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DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve a successor employer that assumed operation of a union-represented precision machining facility the night of December 4, 2011. After establishing initial terms and conditions of employment it rehired many, but not all, of the predecessor employer's employees. The successor employer recognized the employees' union and first met to collectively bargain in February 2012.

5 The government alleges that the employer's conduct from December 2011, through
September 2012, violated the National Labor Relations Act (Act) in a number of ways. It
contends that the employer unlawfully threatened, interrogated, and dealt directly with
employees and made various statements unlawfully undermining the union's status as
10 collective-bargaining agent, and impinging on employee rights protected under the Act. The
government contends that the employer unlawfully instituted a variety of unilateral changes
without first providing the union notice and an opportunity to bargain and unlawfully failed to
furnish the union with requested information relevant to the union's representation duties. The
government contends that the employer bargained with no intention of reaching an agreement
15 and in overall bad faith from February 2011, until negotiations broke off in September 2012,
over the employer's insistence on being permitted to tape record the negotiations. Finally, the
government contends that in January 2012, the employer unlawfully and discriminatorily refused
to hire or consider for hire two employees who had been members of the union grievance
committee under the predecessor employer.

20 As discussed herein, the record amply supports a finding of violation for many of the
allegations lodged against the employer. As a general matter, it operated the facility as if the
union did not exist, the chief departure from this practice being to engage in affirmative
disparagement of the union to employees and to meet with the union in collective-bargaining
sessions that appear designed to render the negotiations a failure. The animus of its top officer
25 and negotiator to the precepts of the Act was not hidden and placed the employer on a collision
course with its duties under the Act. Time and again the record leads to the conclusion that
requirements of the Act were a casualty of its top managers' approach to management and
operation.

30 In a few regards, however, and in one highly significant regard, as discussed herein, I
find that the allegations of the complaint are unproven. In particular, the evidence that the
refusal to hire, or consider for hire, the two union grievors was unlawfully motivated is lacking
and does not persuade. Notably, the failure to hire these two individuals at the commencement
of production, when the vast majority of the predecessor's employees were hired, is not alleged
35 to be a violation (and any such allegations would be vulnerable to a statute of limitations
defense). Rather the government alleges that the unlawful failure to hire, or consider for hire,
the two employees occurred the month after the employer began operating the plant, when it
hired internally for two reconstituted positions that included the job functions that the two alleged
discriminatees had performed for the predecessor. This is a more difficult claim. While I cannot
40 positively rule out that the two positions were initially left unfilled and then reconstituted a month
later for the unlawful purpose of avoiding the hiring of the two union grievors, the evidence is
inadequate to prove it. For the reasons set forth herein, I will dismiss the discriminatory refusal
to hire or consider allegations.

STATEMENT OF THE CASE

These cases stem from a series of unfair labor practice charges filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM or Union), alleging violations of the Act by Advanced Metal Technologies of Indiana, Inc. (AMT or Employer).¹

On September 21, 2012, based on an investigation into the charges, the Acting General Counsel (General Counsel), by the Regional Director for Region 9 of the Board, issued an order consolidating Cases 9-CA-084046 and 9-CA-084610 and a consolidated complaint and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act by AMT. On October 12, 2012, the Regional Director for Region 9 issued an Order Consolidating Cases 9-CA-083508, 9-CA-084611, and 9-CA-088300 with cases 9-CA-084046 and 9-CA-084610. In the same order, and based on these cases, the Regional Director issued a second consolidated complaint and notice of hearing alleging violations of Section 8(a)(1), (3), and (5) of the Act. On October 30, 2012, the Regional Director issued an Order Consolidating Cases 9-CA-088310 and 9-CA-090374 with the previously consolidated cases and issued a third consolidated complaint and notice of hearing alleging violations of Section 8(a)(1), (3), and (5) of the Act by AMT. On November 7, 2012, the Acting Regional Director for Region 9 issued an Order Consolidating Case 9-CA-091378 with the previously consolidated cases and issued a fourth consolidated complaint and notice of hearing alleging violations of Section 8(a)(1), (3), and (5) of the Act by AMT. On December 19, 2012, the Regional Director issued an amendment to the fourth consolidated complaint, in which he added one and deleted one substantive allegation.²

A trial in these matters was conducted January 7-11, 2013, and February 11-12, 2013, in Louisville, Kentucky. Counsel for the General Counsel and counsel for AMT filed excellent briefs in support of their positions by March 19, 2013. On the entire record, I make the following findings, conclusions of law, and recommendations.³

¹The first charge was filed June 20, 2012, and docketed by Region 9 of the National Labor Relations Board (Board) as Case 9-CA-083508. This case was the subject of an amended charge filed July 19, 2012. A further charge was filed by the IAM against AMT on June 26, 2012, docketed as Case 9-CA-084046, and amended August 29, 2012. On July 5, 2012, the IAM filed a charge docketed as Case 9-CA-084610. A charge was filed August 1, 2012 and docketed as Case 9-CA-084611, and an amended charge was filed in that case September 28, 2012. On August 29, 2012, two charges docketed as Cases 9-CA-088300, and 9-CA-088310, were filed by the IAM, and the latter case was the subject of an amended charge filed October 15, 2012. The IAM filed a charge September 28, 2012, docketed as Case 9-CA-090374, and October 15, 2012 (docketed as Case 9-CA-091378).

²On my own motion, I change ¶9 of the fourth consolidated complaint to 9(a), and deem the Respondent's answer to that ¶9 to be to 9(a). The amendment to the fourth amended complaint (GC Exh. 1 (qq)) added a ¶9(b), leaving the original ¶9 in need of sublettering.

³During the hearing, counsel for the General Counsel moved to amend the complaint to add an additional allegation of unlawful interrogation by a supervisor. That motion was granted. Throughout this decision, references to the complaint are to the extant fourth consolidated complaint, as amended on December 19, 2012, and as amended at the hearing.

JURISDICTION

Respondent AMT is a corporation with an office and place of business in Jeffersonville, Indiana, where it is engaged in the manufacture of metal and plastic machined components. In conducting its operations since December 5, 2011, AMT sold and shipped from its Jeffersonville, Indiana facility goods valued in excess of \$50,000 directly to points outside the State of Indiana. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the IAM has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Summer and Fall 2011: Whitesell officers are at the facility to consider a purchase

MKM Machine Tool Company operated a precision machine tooling facility, most recently at a facility in Jeffersonville, Indiana, from the 1950s until it closed December 4, 2011. Its workforce was represented by Local (or Lodge) 681 of the IAM, through the IAM (collectively, Union) for most of that time. The represented bargaining unit was described in the last MKM-Union contract as

All employees of the Employer, excluding office clerical employees and all salaried employees within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

By the summer of 2011, financial difficulties attracted prospective purchasers, in particular the Whitesell corporate group and top executives affiliated with it.

Sometime beginning in the spring or early summer of 2011, Robert Wiese, the secretary treasurer of Whitesell, and Hartmut (Hart) Vogt, vice president of corporate manufacturing for Whitesell, began visiting the MKM facility to investigate the possibility of Whitesell purchasing the facility. Beginning in July 2011, they were at the MKM facility nearly every day for the purpose of performing “due diligence to see if it was a company we would be interested in buying.” According to Vogt, MKM was severely financially distressed, “run down and getting ready to close the doors.” As part of this due diligence Wiese focused on financial matters relating to MKM. Vogt focused on the operations, and as a result, Vogt, in particular, was a ubiquitous presence on the shop floor from July through the acquisition in December.

Sometime in the summer of 2011, Wiese and Vogt conducted a meeting with management employees. First, earlier in the day, they met with the plant’s union stewards, David Mattmiller, Donald Luther, and Charles Wright. MKM (and later AMT’s) Human Resources Director Marketta Elliott was also present. The three union employees were introduced to Vogt and Wiese as the union stewards for the facility. Wiese told the stewards that they were looking to purchase the company. Luther asked some questions about their background and if they had an “issue” with the union. Vogt said they did not—that they had union shops and “at the end of the day everybody goes home and they make money.” They told the stewards that “they didn’t care one way or the other” whether there was a union, “that it was the employees’ union.”

Throughout the summer and fall, Wiese, and especially Vogt spent most of their time on sight. They had no formal supervisory authority but the purpose for which they were there was understood. Over the course of the fall money began to be spent on investment in the facility—sorely needed by all accounts—and Vogt became the person to go to obtain authority for purchases. Vogt in particular spent significant amounts of time watching the employees work and attempting to familiarize himself with the incumbent employees. He instructed Elliott to put up a board in the hallway to the shop floor with every employee's name, picture, and classification, a device that enabled him to quickly put faces to names and positions. According to Vogt, this familiarity with employees aided him later when, as discussed, below, he took primary responsibility for deciding whom to hire for the scaled-down operation commenced by AMT on the night of December 4.

Dan Peterworth was MKM's president. In approximately July, Vogt instructed Peterworth to give Vogt his opinion on each of the employees. Peterworth called Elliott and then Acting Plant Manager Mark Alexander into his office and told them he had been asked by Vogt to do this. Peterworth sat at his computer and recorded information based on Elliott and Alexander's responses regarding each employee. Peterworth said he had been asked to rate the employees on an A-D scale. Neither Alexander nor Elliott saw the document Peterworth prepared but believe that Peterworth passed the information on to Vogt.⁴

Vogt and Wiese had little to no extended personal interaction with the union or its stewards in the months thereafter, except for a notable incident in late September when a state safety inspector conducted a safety inspection. (He had been invited in at Vogt's request.) Elliott invited Mattmiller, the chief union steward to the meeting and when the inspector began the walkthrough he asked Mattmiller if he would be participating. Mattmiller said he would and Vogt intervened, angrily objecting that "I'm not paying him to do a walkthrough, I'm paying him to do a job out there." By Vogt's account, he and the inspector "got into a heated discussion," which Vogt relished retelling from the witness stand:

[E]veryone else in the conference room was kind of like what's Hart doing. You can't argue with the State and I said, you know, yeah, I can. I can argue with anybody I want.

As Vogt explained in his testimony, he explained to the inspector that "[t]o me it seemed ludicrous that a company that was losing money had to waste even more money. I asked them to come in to document what was wrong. The Union didn't ask them to come in. The Union didn't even care." According to Vogt, he continued to argue with the inspector, and eventually, after the inspector threatened to leave, Mattmiller offered to go on the tour unpaid.

Ultimately, the walkthrough proceeded with Mattmiller participating. Later in the day Mattmiller approached Elliott and asked if Vogt had been serious "about me not getting paid for

⁴Alexander could not recall when the meeting occurred. He testified that he "thought it was in the latter part of [] 2011, but I really couldn't tell you when it was." In his pretrial affidavit, Alexander stated that "I do not recall the exact time when I did the A, B, C survey, but if I had to guess I believe we did it sometime in November of 2011." On their face, neither of these "guesses" are particularly compelling. I credit Elliott's surer recollection that the assessment with Peterworth was undertaken in July 2011, which is also consistent with Vogt's testimony that, at his request, Peterworth had provided him with an initial "A, B, C" rating of employees to use as "a quick synopsis" for knowing the "good players" and the "bad players" during his first week in the plant.

this” and she said she did not know and Mattmiller should ask him. Mattmiller went to Vogt’s office that he had set up in the hallway and asked “were you serious about not paying me, he said, well, certainly I was.” Vogt reiterated that the union should be concerned about safety and should be paying Mattmiller for the walkthrough and reiterated that he was serious. At that point, someone else walked in the office and Mattmiller asked again, in front of the other person, at which point Vogt stated, “[O]h I was just joking, I’ll take care of you.” At that point Mattmiller left the room. He was, in fact, paid for the time that he was on the walkthrough.

In mid-November 2011, Wiese held a meeting with the salaried personnel of MKM, and invited the union stewards. He explained that there was going to be an auction of MKM’s assets and that AMT hoped to be the successful bidder, but that could not be assured.

November 29, 2011: A follow-up safety inspection; AMT announces it will assume operation of the facility; the hiring process

After the initial safety inspection in September, described above, Vogt requested a further safety inspection by an industrial hygienist. An opening conference and inspection was conducted the morning of November 29, 2011, with a follow-up closing conference on December 20. The inspector reported at the closing conference that the prevalence of oil on the floor and oil mist in the air created hazards that needed to be addressed. A recommendation to work towards reducing the oil was made and a recommendation made that open food items and drinks should be stored and consumed only in employee breakrooms and/or other areas where there was no oil mist residue. In addition, production noise levels were hazardous in some parts of the production area and a hearing conservation program for employees was recommended. The Employer agreed to the recommendations.

The morning of Tuesday, November 29, AMT successfully bid on the assets of MKM. Meetings with employees were immediately conducted, at 3 p.m. for the first and second shift, and again at 11 p.m. for the third shift.

The following findings of fact are drawn from testimony, notes, and other evidence that captures some—but not all—of the points made by Wiese and Vogt at these November 29 meetings:

At the meeting Wiese explained that although it had taken longer than anticipated, after many months AMT had purchased enough of the assets to begin operation. He went over the background of the financial problems faced by MKM, the negotiations with creditors, and the efforts to purchase the facility. He reported to employees that AMT had obtained the assets and that Friday, December 2, 2011, would be MKM’s last day. AMT would operate the facility beginning Monday, December 5. Employees were told that they would need to apply to be employed at AMT. Wiese said they would be called if they had a job. Wiese discussed that AMT will be making changes in order to be profitable and that AMT cannot accept losses.

Vogt spoke and declared that “everything you know [will] change” and said that AMT has their own policies/procedures.” According to Vogt, the old past practices are “null and void.” He stressed the importance of safety and mentioned that the state safety inspector had been in the plant. Vogt stressed that quality has to improve and every employee must take responsibility for quality issues. Vogt announced that work-rules at the facility will change. “No past practices[.] AMT is a new comp[any].” Vogt said that “new things [are] learned daily” and that they will implement changes.

Wiese talked about some of the financial issues facing AMT. He announced that if employees were interested in a job with AMT they would need to apply. Employees were told to complete the application form and return it to human resources. Wiese announced that AMT was drafting an employee handbook, but that they were focused on saving jobs and equipment, not writing a handbook. He told employees that AMT believes in pay for performance. Wiese told employees that AMT would not be able to hire all the current workforce, but that "we will hire who we can."

Wiese announced that all employees hired would be on a 90-day probation period. He stated that there would be a comprehensive health insurance program, but that the cost, deductibles, and benefits, would change from what was currently in place. Wiese indicated that they were trying to extend current health insurance through to December 31, and that they would provide for people to enroll in Blue Cross Blue Shield by January 1, 2012. Wiese told employees there would be a similar life insurance program to that currently in effect, but no short-term disability program would be automatically provided, rather one would be made available on a voluntary (optional) basis. He announced that AMT would have a 401(k) plan, although it was not available at this time. There would be eight paid holidays, and annual leave and vacation would be combined into a paid time-off program. He announced that the handout being provided to employees at the meeting would list the major terms and conditions but other changes would be made as rapidly as possible. Vogt stated that in hiring he will go by what he has seen in his time at the facility. He stated that current employees will have priority over people on the street.

Some of the information explained by Wiese and Vogt was contained in a letter to MKM employees from Wiese and Vogt, on AMT letterhead, and provided to employees that day. The letter formed the first page of a packet provided to employees that included some pages that appeared to be from a handbook taken from other facilities, and an application to be returned to human resources. Wiese read from the letter at the meeting. The letter stated:

Today Advanced Metal Technologies of Indiana, Inc. purchased some of the assets of MKM Machine Tool Company, Inc, a publicly called foreclosure auction. MKM had suffered four years of tremendous financial losses and was in default to its major secured creditors and could not pay its bills. The legal transfer of title to the acquired assets going to AMT, we expect, will be completed as of the end of the business day Friday December 2nd. Therefore, December 2nd, MKM will effectively cease all business and it will close its doors and be out business permanently. MKM will not be able to continue anyone's employment benefits or other prior commitments; it is totally broke and will be out of business permanently.

Unfortunately, AMT was able to purchase only a portion of MKM's assets and has not been successful in acquiring rights or interests in many of the other secured leased equipment. AMT will be required to make major changes from the way MKM had previously conducted business. Our primary goal will be to make this business profitable so as to provide job security that MKM was unable to provide. Please understand that AMT is a wholly different entity from MKM and is not a successor to MKM's business or operations. AMT has not accepted any of MKM's contracts, customer commitments, supplier liabilities or payables, any accrued payables, or liabilities of any kind. AMT rejects all contracts, commitments, obligation and all liabilities of MKM Machine Tool Company, including the collective bargaining agreement between MKM and Kentucky

Lodge 681, International Association of Machinists and Aerospace Workers AFL-CIO. AMT will start its new business at this location Monday December 5th. AMT will immediately begin taking applications for employment with AMT for all open positions. However, no MKM employees are guaranteed jobs with AMT, and all offers of employment that are made will be contingent upon acceptance of AMT's initial terms of employment, which will be substantially different from those provided by MKM. When individual job offers are made, AMT will furnish an initial summary of the initial terms being offered. AMT recognizes that the hourly employees at MKM were represented by the IAM Union, and we respect the right of employees to choose whether or not to be represented by a union. AMT will honor any and all legal obligations, including any such obligations to recognize and bargain with the IAM Union that may arise.

If you are interested in applying for a position with AMT, please take an application and turn it in to HR immediately. You will be notified before Monday, if we are able to extend you a job offer. We are hopeful that with the changes that are being made, we can make AMT a successful and profitable stable long term business. We hope that you will consider a future with AMT

Some questions were taken near the end of the meeting about a variety of subjects. An employee asked about pay rates and Wiese said that employees needed to get their application in and if they were hired they would be told what the pay rate was going to be. An employee asked about vacation time accrued with MKM and the answer given was that vacation time with MKM was lost, there were "no benefits carried forward." Employees asked who was going to be hired. Vogt "said that he would go by what had had seen, just by his observations since he had been in the facility for about five months. He would go by what he had seen during his observations." Vogt said that "hiring was going to be based on people's ability, their attitude, their performance and it was not going to be based on seniority."⁵

Most of the MKM employees submitted applications for employment with AMT. Approximately 108 unit employees were hired by December 5, 2011. Elliott made calls to each applicant over the weekend between December 2 and 4 to make offers of employment or to tell them they were not being hired. Nine former MKM unit employees did not apply to work at AMT. Of the ones who did apply, 26 former MKM hourly employees were not offered employment by AMT. This included two of the three union stewards, Charles Wright and David

⁵A number of witnesses testified about what was stated at the meeting. The most extensive accounts were provided by Wiese and Elliott. While testifying, Wiese relied heavily on the "script" he prepared in advance of the meetings, a script he claimed to have hewed closely to in his presentation. Elliott's testimony relied heavily on her contemporaneous notes of the meeting, which were introduced into evidence. I largely credit their accounts, and that is reflected in the findings in the text regarding the meetings. I do not credit Wiese's testimony that in response to questions about the union at the meetings he told employees "that's between you, the employees and the union, . . . AMT doesn't care one way or the other." This was not reflected in Elliott's notes—which included notes on questions asked by employees, and it sounds too similar to comments attributed to Wiese in the July 2011 meeting with stewards. Similarly, I do not credit employee Luther or Rose's testimony that Wiese referenced Indiana's (then pending) right-to-work legislation in the November 29 employee meetings. The record evidence suggests that this subject was raised by Wiese at a subsequent employee meeting in February 2012.

Mattmiller. The other union steward, Donald Luther, was hired. In addition, most of the salaried MKM workforce applied and most were hired (four were not, approximately 20 were). As of the commencement of AMT operations on December 5, 2011—or more precisely, the third shift began work at 11 p.m. the night of December 4, 2011—the workforce was composed
 5 exclusively of former MKM employees. Throughout the course of 2012, additional employees were hired over time, but very few from the ranks of former MKM employees.

In terms of hiring, Vogt testified that he made the decisions on how many MKM employees to hire based on the initial need for manpower. Vogt originally thought that AMT
 10 would start with approximately 150 employees but as the week progressed, and it became clear that certain MKM customers were not going to renew orders with AMT, he estimated that AMT would need approximately 100 employees.

In terms of whom to hire, Vogt testified that he relied upon the applications, and
 15 eliminated those that worked in functions in the plant that were being eliminated. He also received input on hiring from Whitesell Corporate Quality Director Larry Mardegian, who was regularly onsite reviewing quality systems issues as of September. Mardegian was “asked to tell [Vogt] who I would bring back,” presumably in the quality department. In addition, “one of the tools “ Vogt used for the hiring decision was a chart he had made—or completed, it had
 20 been started by Peterworth in July and developed by Vogt over time later—on which he rated MKM employees based on his observations. Vogt admitted it was a subjective evaluation, but he assigned numerical scores to employees with columns for technical ability, attitude, and a third for overall rating, based on his observations and experiences since being at the facility. He testified that in doing so he disregarded Peterworth’s evaluations and relied upon his own
 25 observations. He performed this exercise twice, once at the end of October and then again towards the end of November. The final scores for employees ran from 12 (the best, received by about 14 employees) to 3 through 6 (the worst, received by about 27 employees). Vogt termed the ones below a score of 7 as the “poor performers,” although a few of them were hired. Most were not. Mattmiller and Meredith were in that latter group with scores of 6.

Of the employees who were not removed from consideration based on their machine or function being eliminated, Vogt testified that he made four piles in order of hiring preference. After Vogt calculated the jobs in which he wanted to hire, he provided the first (top) group of applicants to then Acting Plant Manager for MMK Mark Alexander (who became operations
 35 manager for AMT) and told him “here’s the employees that you can hire for your equipment. Put those employees on the machines that you see you need to run . . . Put them where you want to put them. These are the employees I picked.” Alexander assigned the employees to machines and then returned to Vogt requesting additional employees to place in positions. Vogt provided additional employees. According to Alexander, he was about 15 employees short and
 40 Vogt “brought me nine or ten more or something like that even though I asked for 15. He only brought me so many more out and I put them on the machine and he told me that was all the people that’s going to go.”

In determining in which areas AMT needed to hire, Vogt testified that he was governed
 45 by some operational decisions that are of relevance to these unfair labor practice cases. First, Vogt determined to “wipe out most of the Quality Department.” This was consistent with Vogt’s intention, stated to employees in the November 29 meeting, that quality would become the concern of each operator, and that AMT would move away from a system where inspectors enforced and monitored the quality of machinist and operators’ work. Whitesell Quality Director

Mardegian, who had been on site for a few days nearly every week beginning in mid-September, agreed that the quality systems at the plant needed an overhaul. Vogt explained: "I was going to slash and burn Quality. For one thing, we had two Quality Managers. We had a dozen inspectors. All non-essential. . . . I just need somebody in charge of Quality and I just needed three auditors that would roam around and double check what the employees were doing. Just randomly audit, not really inspect. So my thought was I'm just going to wipe away most of the Quality Department.

As part of the change to and diminution of the quality department, Vogt and Mardegian initially talked about having the gauge calibration work done by outside vendors, and eliminated as an AMT function.⁶ Under MKM, gauge calibration work had been done primarily by quality department employee David Mattmiller, who was also the chief union steward. Vogt testified that MKM was "hundreds of gauges behind on calibration" and Vogt believed he could "do this cheaper on the outside and I eliminated the position." Mardegian testified that the gauge calibration was behind and that the calibration lab was "a mess" and "a shambles." Initially, upon AMT's assumption of operations, the gauge calibration work was left undone, a situation that could not continue indefinitely.

In addition, Vogt eliminated the tool crib position. The tool crib was centrally located in the facility and housed the tools needed by the operators throughout the shop. Under MKM, one employee, Union Steward Chuck Wright, manned the tool crib and issued tools to employees who waited at the half door of the tool crib for Wright to retrieve tools they were requisitioning. Vogt testified that the "tool crib was a disaster" and "out-of-control." Vogt contended that he didn't "need that body to run the business. If an operator needs a tool, we'll just lock it up, the tool crib, and he can see his supervisor and get the tool that he needs. I don't need to have a person sitting there and issuing out the tools. Eliminate that cost."

December 5, 2011: production commences, initial terms and conditions implemented

Beginning at 11 pm December 4, AMT began to run 24-hour (three shift) production five days a week. On December 4, before the night shift began production, Wiese asked Elliott to post a two-page document titled "Initial Terms of Employment" in the shop.

This document reiterated that AMT

will be setting the policies, working rules, employment guidelines and procedures and all other conditions of employment required by law. As discussed we will be preparing and implementing an Employee Handbook.

The notice went on to say that the handbook would include but not be limited to an expansive management rights clause. The notice then stated that it was listing "general Benefits guidelines" but that "Benefit details are being prepared and are subject to changes and modifications." The notice then listed:

⁶In the transcript, the word "gage" and "gauge" are used interchangeably. It is the same word. Throughout this decision I use the spelling "gauge" without regard to how it is spelled in the transcript.

- pay for performance, with an initial pay rate set by management with increases “subject to individual performance;
- a probationary 90 day evaluation period for all employees; shift premium and overtime rates;
- health and dental insurance and rates through December 31, with a switch to BlueCross Blue Shield on or about January 1, 2012, with health insurance rates to be announced and subject to annual adjustment;
- direct deposit for pay;
- life and ad&d insurance, benefit to be determined but similar to one-time annual compensation;
- voluntary short and long term disability, additional life insurance, to be made available “as soon as possible”;
- paid time off
- 401(k) “to be offered at a future date
- Holidays
- Bereavement leave
- Uniforms
- Safety shoes and safety glasses.

In fact, no handbook was ever written or implemented.

December 2011 through January 2012: AMT institutes changes

New rules on coffee, food, and ear buds

As suggested at the November 29 meeting and in the “initial terms and conditions” memo, AMT continued to make changes in terms and conditions of employment.

Under MKM, coffee was supplied by the employer for free (cups were 3 cents) and employees could bring it into the production area. The coffee was available in pots located in various parts of the facility. Those pots and the remainder of the coffee purchased by MKM remained available for use and were used by AMT employees after the commencement of production under AMT. However, AMT renovated the break room and sometime in January 2012, vending machines serving coffee at reduced prices were made available to employees in the break room.

In addition, under MKM, employees were permitted to wear ear buds, and listen to music through personal radios, iPods, and the like, while they worked. Evidence also suggests that some employees listened to radios without earphones while they worked.

By memo to employees dated January 5, 2012, Elliott informed employees of certain “immediate changes in work areas” that were being implemented as a result of the November 29, 2011 inspection by the state safety inspector. Elliott’s memo stated, among other items, that

All coffee pots, microwaves and refrigerators must be removed from the shop floor by the end of this week. In addition, only closed top drinks are allowed on the shop floor. No open containers or food will be allowed in the work areas

In addition, the memo stated:

Due to our recent safety concerns, we must keep radios off the shop floor. No iPods, MP3 players, earphones or headphones will be allowed on the manufacturing floor. We must all be able to hear and be aware of all hazardous noises and warnings.

5

This was the first official announcement to employees of these changes. The Union was not informed of these changes before they were implemented.

10 The prohibition on open food and drink in the production area had been suggested by the safety inspector after his November 29, 2011 inspection of the facility. Credited testimony (Rose, Renn) demonstrates that after the memo came out, the coffee pots were removed and vending machines in the refurbished employee break room at the price of 10 cents a cup became the source of coffee for employees.⁷

15 As to the prohibition on ear buds and music players, although announced officially for the first time on January 5, there is evidence that the prohibition had been implemented as an "unwritten rule" from the commencement of operations by AMT. Employee Renn credibly testified that on or about December 5, 2011, "right at the beginning of when I was hired on," he "noticed nobody had ear buds in" although he knew a lot of people who normally wear them.
20 Renn recalled a specific conversation with his supervisor from the first days of AMT production in which his supervisor told him "we're not going to be allowed to wear" ear buds while working. Renn endorsed the truth of the statement in his pre-trial affidavit in which he stated that "day one of AMT operations, December 5, 2011, we were no longer allowed to wear ear phones to listen to music."⁸ Elliott testified, specifically with regard to the policy prohibiting the wearing of
25 earphones that "we didn't allow iPods or MP3 players or cell phones or anything on the floor after December 5th," but that until January 5, it was an "unwritten rule." Alexander also testified that the rule on wearing ear buds changed on December 5, the day AMT took over, and that as of that date he would approach any employee he saw wearing ear buds or the like and "tell them it's not allowed."⁹

⁷I do not credit Vogt's testimony that all coffee pots on the floor were eliminated around the plant on "[d]ay one, first week." It is corroborated by no one and contradicted by the January 5 memo, and a number of witnesses, including Elliott, who described the free coffee remaining in pots, apparently left over from MKM but continued to be used around the plant for the first few weeks of AMT's operation. Indeed, Respondent's counsel explained that the coffee was available and left over from MKM in his opening statement.

⁸See Fed. R. Evid. 801(d)(1). Notes of Advisory Committee On Proposed Rules ("If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem").

⁹In light of the consistent and numerous witnesses who recalled that ear buds were prohibited on the shop floor from the commencement of production under AMT, I discredit employee Rose's recollection that before issuance of the January 5 memo employees were permitted to wear headphones. However, it is possible that it was true for Rose. Because the rule was "unwritten" before January 5, and never officially announced, some employees may have continued wearing headphones or ear buds until January 5. Until January 5, the rule was enforced by individual supervisors approaching employees they saw with earphones and telling them individually that they were not allowed to wear them.

The union bulletin board

Under MKM, and after AMT commenced operations, there was a series of cork board bulletin boards (see, R. Exh. 11) in the center of the facility attached to the back side of the racks in the shipping area. The boards ran approximately 12–15 feet long and was divided into sections: there was a human resources section for employer postings, there was a section for union-posted material (labeled union at top), there was a section for government notices, a section for quality-related notices, and a spiritual section, presumably for religious or inspirational postings, and a section for individual notices for employees to post items for sale, or cards for local businesses. These bulletin boards were on the back side of racks in the shipping area. Chief Steward Mattmiller maintained the board for the Union.

The first week after AMT commenced operations, Vogt and Elliott began removing any items on the bulletin boards that referenced or related to MKM, as well as personal notices, business cards, and for sale items. However, when they got to the union bulletin board they decided to leave the board up. As Elliott testified:

We left all the Union information. He and I each got to that and I said I'm not touching that one and he said I'm not either.

Vogt testified about the same event:

Then to the far left was what was called the Union bulletin board. I didn't touch anything on that.

Later that week, however, the union information was removed. Operations Manager Alexander observed an employee, Steve Meredith, saying something to the effect of "we don't need this shit anymore," tearing off the union materials from the bulletin board. Alexander made no move to stop him, but reported the incident to Elliott. Neither Elliott nor anyone at AMT took any steps to inform the Union of what happened or to replace the bulletin board.

The union section of the bulletin board remained empty after that time, and Elliott testified that there were no subsequent requests to post any union material on it, although it is relevant that the union steward responsible for maintaining the union bulletin board was not rehired by AMT.

Sometime between February and June, the record is unclear, and the testimony inconsistent, the shipping department was moved. The shipping racks, and the bulletin boards on them were thrown out. Henceforth, AMT posted notices behind the glass-encased locked bulletin boards in the break room. There was no union bulletin in the break room, or elsewhere. The record reveals no complaint by the Union at the time or any effort to post anything on the new bulletin boards. The Union raised the issue through the filing of an unfair labor practice charge in July 2012, and asked for the union bulletin board to be reinstated during bargaining in August 2012.

Change in bargaining unit work: gauge calibration and tool crib jobs.

As referenced above, AMT initially did not assign any employee to calibrate gauges, an essential function in the facility, but one that Vogt testified that he considered contracting out.

As noted, this was work performed by Union Steward Mattmiller under MKM, and the initial decision not to hire someone to do this work directly resulted in Mattmiller not being hired or even considered for employment on December 5. According to Vogt, when he decided to eliminate the position for someone to do gauge calibration work, "that was [Mattmiller's] position. So, he went to the no pile." The work was never sent out, but according to Vogt was "not high on my priority list." Vogt testified that as he walked around checking gauges he learned that the gauges they had were inadequate. AMT remained "very far behind"—over 400 gauges behind—in gauge calibration work.

Vogt testified that around Christmas time, he decided he needed to develop a new position to develop proper gauging, to work with gauge vendors in the marketplace and obtain better gauges for the facility. Vogt envisioned a position that was more than simply gauge calibration but a position that would also involve designing, developing proper methods of measuring parts, with quicker more accurate gauges. The position envisioned by Vogt included gauge calibration, but involved more than that. In early January, Vogt discussed this new position with Mardegian, and "gave the ball to him" to pursue it if he agreed that was what was needed. Mardegian described the position Vogt was envisioning as "gauge management, [] from the initial product identification through the actual satisfaction of the customer getting good product." This would include gauge calibration as a piece of a larger process embedded in "more of a management person than a hourly person."

Craig Meredith was a quality employee who had performed the small amount of gauge calibration work performed since AMT commenced operations. As the gauge calibration deficit became more of a problem, Meredith volunteered, sometime in late December or early January, to take over the gauge calibration position that he knew had been left vacant. Records indicate he transferred into a position called "Gauge Calibration Specialist" on January 16, with no pay change. It is unclear, but likely, that this was a trial step before moving to the salaried gauge position that Vogt and Mardegian had discussed. In any event, sometime in mid-January, Meredith approached Mardegian and said that he heard on the floor, probably from managers, that there was a new gauge position opening and that he wanted to apply for it. Mardegian discussed the position with Meredith and his background, which included supervisory experience. After a couple of conversations, Mardegian went to Vogt and told him that he had a candidate for the management gauge position. On February 1, Mardegian sent an email to Vogt stating, "We have observed Craig Meredith in his new position as Gauge Calibration Specialist. He has been quite effective in reducing the previous backlog . . . We are prepared to initiate the next steps in moving him from hourly status to the approved salaried position." Vogt approved the hiring of Meredith for the position after assuring himself that Meredith understood he would be "a leader within AMT and that he must perform accordingly." Meredith was promoted into the new position, and it was made effective January 30. It was a salaried position, considered by AMT to be part of management, and not part of the bargaining unit.¹⁰

¹⁰Mardegian testified that he did not consider Mattmiller for the position "[b]ased on the non performance I observed back in November and the lack of commitment, not doing the job." Mardegian testified that the MKM Quality Manager Jerry Helbig had told him that Mattmiller was 300 gauges behind in calibration. Vogt testified that he didn't consider Mattmiller because "[h]e wasn't employed . . . didn't have the knowledge as far as I knew and he wasn't there. Craig was there he's an existing employee, perfect, no more additional costs and he could do the job."

A second type of bargaining unit work that had been performed under MKM but had been delayed under AMT involved work managing the tool crib. As described above, the tool crib is part of an island of offices and rooms situated in the center of the shop. Tools needed for production operators to perform their jobs are housed and inventoried in the tool crib. Under AMT, one employee, Charles Wright, worked in the tool crib, retrieving and handing out tools to operators and machinists who came to the door—a half door with the window open—requesting needed tools. Wright would log the tool disbursement in a computer that kept track of tool distribution. On shifts when Wright was not working the tool crib was kept locked and supervisors would enter to retrieve tools for employees. On average, an employee approached the tool crib seeking a tool every 15–20 minutes although that varied considerably. MKM did not spend enough money to update the computer system so that whereabouts of the tools could be catalogued. Much of this information about where particular tools were was known by Wright and no one else, although he made written notes of much of the information so that others would be able to see where the tools were kept.

When AMT commenced operations it left the tool crib unmanned, and Wright was not hired by AMT. Vogt testified that he made the decision initially to eliminate the tool crib position because the tool crib was “out of control” and a “disaster.” Vogt also decided that he didn’t “need to have a person sitting there and issuing out the tools.” Vogt planned for supervisors and employees to retrieve their own tools from the crib. Because of the inadequate computer records it was often difficult to locate tools within the tool crib. Alexander considered the tool crib “a disaster and you couldn’t find nothing.”

Vogt decided that AMT was not using the proper tools to make parts with. Vogt decided around Christmas time that he wanted to hire a “tool guru” to find and implement new tooling that would increase productivity through the use of proper tooling. Vogt discussed it with Alexander and told him to give the idea some thought. Vogt told Alexander that he did not want to hire someone to stay in the tool crib handing out tools, but rather, wanted someone in a salaried position to help find new tooling, with an emphasis on equipping the machining “tool caddies” or “candy machines” that were portable tool dispensing units stocked and set up around the plant so that operators could secure their own tools out of the “candy machines.”

Although Vogt had not asked Alexander to find a candidate, Alexander approached Vogt and told him he had found “the ideal person” for the position. He told Vogt, “here’s the guy that can do” the job that Vogt had described to Alexander. That person was Kevin Kennedy. Kennedy had been a CNC machine operator for many years at MKM. Kennedy was initially hired by AMT on December 5 as a machine operator. Alexander testified that Kennedy came to mind because “he took pride in his job” and was an employee who “always tried to improve jobs all the while he was out running the machines. Alexander approached Kennedy about the position. After it was explained, Kennedy expressed interest and Alexander went to Vogt and recommended Kennedy. Kennedy was hired to be the tool management supervisor on January 9. He was told it involved managing the tool crib and managing all the tooling on the floor, with

an expanded use of the tool caddies to supply machines. The work would include organizing the tool crib so that it could be efficiently operated "on its own" without a dedicated employee.¹¹

5 AMT did not notify the Union in advance of its intention to remove the tool crib work or the gauge calibration work from the work performed by bargaining unit employees.

Bargaining begins in February 2012

10 By letter dated December 8, 2011, from the Union's attorney Irwin "Buddy" Cutler, the Union requested recognition and bargaining from AMT. Vogt and Cutler arranged for an initial meeting date of January 11, 2012. The Union cancelled that meeting shortly before it was scheduled to take place and Cutler and Vogt agreed on February 9, for the first meeting.

15 By letter dated January 27, Cutler requested information from AMT regarding current terms and conditions of employment and a list of employees with each employee's name, address, telephone number, email address, if known, job title, and rate of pay.

20 Wiese responded with an email, dated February 1, 2012, in which he introduced himself and explained that he would be joining Vogt for what Wiese called the February 9 "discussions about the possibility of a union agreement for the employees here."

25 In his email, Wiese questioned whether Cutler was seeking information on all bargaining unit employees or just union members. Wiese, in turn, asked for a list of dues paying union members at AMT. He stated in the email that, as Indiana had recently enacted right to work legislation, he was "uncomfortable" providing the Union with contact information (he called it "confidential" information) about non union member employees. Wiese asked for "NLRA info" showing that he was required to provide information on all unit employees. Alternatively, Wiese said "I will ask the employees to authorize us to release the information to the Union." Wiese also asked for the first time, in a demand that was to become a pervasive issue in negotiations, 30 for certification of the IAM's representative status for the employees at this location.

35 Cutler wrote Wiese back on February 2, explaining that the Union represented all bargaining unit employees whether member of the Union or not and, therefore, wanted and were entitled to the requested information about all employees. Cutler also addressed Wiese's request for the Union's certification of representation, a representative status the Union had enjoyed with MKM employees for over 50 years. Cutler wrote:

I do not have the NLRB certification for the MKM employees. The Union has represented those employees for many, many years, and I do not know if the

¹¹Alexander testified that he did not think of Wright for the position because Alexander had a negative view of Wright's organizational skills and work ethic. He based this on

working with Mr. Wright and seeing how the crib, the shape it was in that his computer skills were lacking and his going out and helping out on the machines and things like that before wasn't there. So between his organization skills and actually helping out wasn't there, so it didn't come to my mind.

Vogt testified that he did not think of Wright for the position because: "I didn't want to hire him. He was in the no pile [from the December 5 hirings] and that was it."

Union still has the original certification or recognition papers. In any case, there is no question that AMT, as a successor to MKM is obligated to bargain with the Union as representative of the same unit employees as it represented at MKM.

5 The day before the meeting, in response to a request made to AMT, the Employer provided the Union with the packet of policies and that it had provided to employees on November 29, along with a spreadsheet listing employees.

February 2 employee meeting

10 On February 2, 2011, AMT held an employee meeting to discuss a number of subjects. According to notes prepared in advance by Wiese and used for his talk, Wiese thanked the employees and praised their dedication and teamwork. He announced the implementation of a 401(k) program and a life insurance program. Wiese discussed right-to-work legislation that
15 had recently been enacted in Indiana. He told employees that “[y]ou have been given back the right to make your individual decision whether you want to pay dues or not. Now you can make the decision in the state of Indiana. I have not yet seen the details but I will get it and let you know the rest of the individual rights that have been returned to you.” Wiese also discussed labor law and the union. The “script” that he wrote out in advance and testified that he followed
20 stated:

Next is NLRA National Labor Relations Act. I don’t know much about the Act and learning more each day. What I want to explain today is what AMT is
25 required by law to do. You have a Union representing you by virtue of the fact that MKM Machine had a union in this building. The IAM has the legal right to represent you for a year. You cannot replace them whether you wanted to or not. You cannot go to a different union. You cannot vote them out. AMT is required to sit down and see if we can negotiate a new contract for you. I don’t understand all the attorney and legal stuff of the NLRA but we are going to make
30 every effort to fully comply with it. Next week we will begin negotiations with the IAM. As I understand it, I will be limited on what I can and cannot talk to you about going forward. I know that I will not be able to negotiate directly with you. The rest of the stuff I will just have to learn. But just want to let you know [what] we will begin doing next week. Hart [Vogt] and I will represent you well as the
35 employees of AMT.

February 9 bargaining¹²

40 The February 9 meeting took place at AMT’s facility in Jeffersonville, Indiana. Present for the Union were Cutler, Mattmiller, and Wright. Union business representative Billy Stivers arrived after the meeting began. The Employer was represented by Wiese and Vogt.

¹²In addition to oral testimony at the hearing, in reconstructing events at the bargaining table I have relied upon contemporaneous notes of bargaining taken by some of the witnesses and intended to record discussion and events at the bargaining table. I accept these as evidence of what was stated at the bargaining table and of what transpired in bargaining. *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 2 (1969); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 483 (5th Cir. 1963). The contemporaneous notes of various witnesses were entered into evidence without objection.

The meeting lasted from approximately 9 am to 12 noon. On behalf of the Union, Cutler proposed essentially the same collective-bargaining agreement that was in force between MKM and the Union. Cutler also told the AMT representatives that the Union was going to propose a modest wage increase. Wiese responded by rejecting the suggestion that AMT should accept any contract like the MKM contract. He talked about the poor financial condition of MKM and asserted that the old collective-bargaining agreement "led to the downfall of MKM." Wiese said that he "was not interested in a contract with the . . . Union , unless the Union demonstrated to the Company the benefits to the Company of a . . . contract." Wiese said that it was "absolutely necessary" that there should be a "substantial wage rollback." Union committeeman Wright forcibly responded, rejecting the idea that the union or the contract were to blame for the downfall of MKM.

Vogt stated that "we . . . don't believe [we] need a contract for this company" because AMT doesn't "abuse their employees."

After some more colloquy, Cutler asked Wiese and Vogt to provide a counterproposal if the MKM-based proposal was inadequate: "tell us what's wrong with the MKM contract . . . give us a counterproposal and we'll look at it."

Vogt pulled an empty sheet of paper off a pad and said, "we did give you a proposal" and handed the blank paper to Cutler. Cutler asked Vogt if he was serious. Wiese responded that "we have no reason to contract with the IAM. Tell us what is the benefit to the Company of having a contract with the Machinists." Vogt said, "if it doesn't add value, I don't want to bring it in." Vogt said that he was not going to agree to any contract that doesn't add value to the company."

Wiese's contemporaneous notes taken at the meeting state: "Need to explain why AMT should contract with Union; what is the benefit. We see your contract; we offer blank contract. We see no need for a contract."¹³

Wiese referenced the health care claims for employees that remained unpaid by MKM and provided a list to Cutler. Wiese said that we "[n]eed to talk about health insurance claims." Wiese requested that the Union pay the unpaid health care claims. Wiese asserted that "

t]he Union and MKM entered into an agreement and told these employees that you would provide them Health Insurance. MKM failed and . . . [did] not hold up the[i]r part of the agreement but the IAM Union can. IAM cont[r]acted to provide

¹³I discredit Vogt's testimony that in handing the blank sheet of paper to Cutler he told Cutler "this is where we start" or "we start from there . . . [t]hat is where we go." The suggestion in Vogt's testimony that he was proposing an all new contract—starting from scratch, in effect—is at odds with Cutler's testimony, Cutler's notes, Wiese's notes, and inconsistent with the context: Cutler was asking for a proposal, and the response, a blank piece of paper, was followed immediately by suggestions by Wiese that there was no reason to have a contract. Cutler's testimony was heavily dependent on his notes, which sometimes appeared to refresh his memory, but more often provided a contemporaneous account of events at the table as recorded by Cutler at the time. But Cutler testified credibly, with honest demeanor and with care not to overstate. Vogt was not similarly impressive. I also discredit Wiese's assertion that "I told the Union that I wanted to enter into a contract that we can work together instead of being adversarial." No one else present, including Vogt testified to any such comment by Wiese. It is inconsistent with the tenor of the comments contained in Wiese's notes.

insurance to these employees and IAM signed that agreement. You need to pay these unpaid health claims for these employees as you promised. I want you to pay this \$239,000.

5 Cutler rejected this demand.

Stivers arrived and after a caucus, Cutler asked questions about the people performing the gauge calibration work that Mattmiller used to perform the tool crib work that Wright used to perform. Cutler asked if Kennedy performed any bargaining unit work. Wiese said he would not
10 provide that information and that the "Company and the Union, haven't yet determined what is bargaining unit work and what is not."

The parties returned to discussing their proposals. Cutler told the Employer that whether a contract benefits the Employer or not, the Employer has a legal obligation to negotiate a
15 collective-bargaining agreement. Cutler said that the Union had made a proposal and it was the Employer's turn to make a counterproposal or to tell the Union "specifically what's wrong with our proposal." Vogt responded: "we've given you a proposal, no contract." Vogt said that "a contract costs the Company money and adds no value." Wiese asked "how the Union is going to provide a return." Wiese asked "if the Union would guarantee productivity" and asked if the
20 Union would guarantee attendance." Then Wiese said that AMT would enter into an agreement, "but it's got to be bilateral. The Union has to promise certain things that are of value to the Company, before they would agree to a contract." Weise said he wanted the Union to "guarantee a work force." Cutler told him that the Union does not have a hiring hall and does not furnish workers.
25

Cutler pressed to know if Wiese and Vogt were going to offer a contract proposal. Wiese said he would give the Union "what he gave us yesterday," but without a wage rate. This was a reference to the packet of materials provided to applying employees on November 29. It was largely composed of what appears to be handbook pages drawn from a handbook used at
30 another unnamed facility. Stivers saw this packet for the first time at negotiations and, encouraged by it, said that maybe the parties were not as "far off" as he had thought.

Cutler asked how long they proposed to keep the current conditions in effect. Wiese said on a day-to-day basis "just like what we have for the employees right now. If they work . . .
35 . . . we honor the Law and they will get their pay guaranteed by the Federal Govt under the wage and hour laws."

Minutes later, Wiese said that he would propose the current terms and conditions, with no wage increase, for three years or 20 years duration. Wages, according to Wiese would be
40 changed for the "people who perform" and "supervisors decide if employees are performing and how well they're performing." Wiese said he would offer a shift differential as well.

The parties decided to break. Cutler testified that "[i]t didn't appear to us that the Company was seriously bargaining. And we didn't see any point in having further discussions
45 along that vein." The parties decided to meet again February 22.

The Union cancelled the February 22 meeting the afternoon of February 21. According to Cutler,

The indication we got then was that they weren't going to agree to anything unless it added value to them, and they were making proposals that appeared to us to be sort of wild and not really thought out proposals.

5 Cutler called Weise and left him a message saying that the union was cancelling and asked Wiese to contact him to let him know he got this message and then they would set a new date for bargaining. Weise did not get back to Cutler as requested because, according to Wiese, he "was pissed" having driven five hours to Jeffersonville for the meeting. Neither party contacted the other until the Union contacted the Employer in June to set up another bargaining session that was held July 25, 2012.

Events occurring between the February 9 bargaining session and the parties next bargaining session of July 25

15 March implementation of attendance policy

On March 7, 2012, Elliott posted a memo to employees, which was then distributed by supervisors to all employees, announcing a newly implemented attendance policy. The memo stated that the attendance "guidelines" were "effective March 1, 2012." The memo contained a place for employees to sign and date acknowledgment of receipt of the attendance policy and to sign a statement that failure to adhere "to these guidelines will result in a point accumulation that will result in discipline up to and including termination of my employment with AMT."

25 Elliott wrote the initial draft of the new policy and finalized it with Vogt and Alexander. The implementation of the attendance policy was timed by AMT to coincide with the completion of the 90-day probationary period that it had placed all employees on upon hiring. Prior to March 1, there had been no policy and AMT felt free to handle attendance issues in any manner it chose. Vogt testified that "it's amazing, you know, when everyone's on probation, everyone can show up for work every single day" but based on his experience he believes that "when people get off their probation, wow, all of a sudden they get sick, that's just human nature." Anticipating this problem Vogt testified that AMT "knew we were going to have an attendance [issue] I didn't want one supervisor doing one thing and another supervisor doing something else. So we came up with an attendance policy that would be applied uniformly across the plant."

35 The Union was not notified in advance of the implementation of the attendance policy.

Implementation of optional insurance coverage

40 AMT offered employees "voluntary" insurance under AFLAC (cancer care, supplemental accident coverage, critical care and recovery) as an option for the first time in late May, effective, June 1, 2012.

45 Prior to this time, AMT did not offer this benefit to employees. In its November 29, 2011 packet of materials distributed to prospective employees, AMT's provided documents that included a reference to "voluntary insurance . . . for Cancer, Supplemental Life, Short Disability and Accident coverage" that was purportedly available "the first of the month following date of hire." In fact, none of the voluntary insurance was available, and the attachments to the November 29, 2011 packet did not refer in many cases to benefits available for AMT

employees. Wiese referred to this packet as “an extract of a document sweep” and explained that “AMT hadn’t formulated their own employment items at this time.” AMT had no arrangement with AFLAC to cover AMT employees at this time, but Whitesell had used it in the past.

The initial “initial terms and conditions” memo posted December 4, referred to the following “voluntary insurance benefits” that were going to “be made available at 100% employee cost as soon as possible for: Short Term Disability[,] Long Term Disability[,] Additional Levels of Life Insurance.” In May 2012, AMT offered employees “voluntary” (i.e., optional and employee-paid) Guardian insurance for short and long-term disability insurance, and for additional term life insurance that an employee could choose to purchase.

Effective June 1, 2012, AMT made the AFLAC cancer care, supplemental accident coverage, and critical care and recovery insurance options available to employees. According to Wiese, the benefits were not offered sooner because:

In order to get someone to bid on it, you have to supply all of the information, employment roles, paychecks, their applications, they don't want to just take on new accounts, they wanted to see what the population was, and also to line up personnel from those companies to come visit with the employees and talk to them. All of this is not immediate stuff to be implemented.

The Union was not notified in advance of the implementation of the optional insurance and disability options for employees.

Union handbilling and Wiese’s posted responses

During the period after the February bargaining, the Union met with members and handbilled the facility approximately every week to ten days between mid-March and May. Annotated with Wiese’s handwritten comments, copies of some of the union literature were posted in the facility around March 16, 2012.

For instance, a letter to employees from union representative Stivers stated “without a contract, you are mere employees at will and can be fired at the whim of AMT.” Wiese hand wrote: “Not True!” and “*FALSE” On another leaflet, Stivers supplied employees with a description and definition of “At Will Employment” that stressed the vulnerability to discharge of an at-will employee. Wiese wrote on this leaflet

not accurate—doesn’t fly—scare tactics—create unjustified fear—

Wiese then wrote:

good employees get increases—bad employees get unions.

Stivers issued a leaflet that asked employees:

- 1.) Do you want to remain in the Union and have the IAM represent you?
Yes
No

2.) Would you attend a meeting to discuss issues pertaining to AMT and MKM

Yes

No

Name:

Wiese marked an X next to NO for each question and signed it as "R. Wiese and ALL AMT Employees."

In addition, AMT posted a letter to "all AMT employees," signed by Vogt and Wiese that responded to some of the union's literature. The letter accused the Union of "spreading disinformation about AMT and the collective bargaining process." The letter stated:

The Union claims that AMT 'took away' your benefits and seniority and that is completely untrue. It was MKM and the Union who promised certain benefits and seniority in the past; not AMT. Unfortunately, MKM closed, and as far as we can tell, the Union has not offered to make these benefits up to you, even though they gladly collected your dues for many years. How much did they collect over 5 years @ \$100 month x 12 months x 180 employees? You do the math.

AMT will never take \$100.00 a month out of your pocket and not provide you real benefits. AMT puts its money where its mouth is.

Employees have the right to support the IAM or any Union. But in Indiana you now also have the right not to ever pay any dues whether there is a Union or not. At this time, we do not have the legal right to deal directly with you on wages, benefits, and terms of employment, even though we believe that doing so is the best way in this day and age. More than 90% of all private sector employees have chosen to be union-free. So think carefully for your future in responding to the card distributed by the Union. Ultimately it is your individual choice and right. You decide whether the Union stays or whether it goes. [Original emphasis.]

April interrogation

Sydney O'Bryan is an AMT employee and was a long-time MKM employee. Vogt described him as "one of our better, more knowledgeable employees." O'Bryan testified that he had never worn union insignia or held a union office. In April, Vogt noticed O'Bryan working on one of the hydromat machines and Vogt started a conversation with him. Vogt testified that he speaks with O'Bryan "quite often because he's a wealth of knowledge and during the conversation"—about the machine O'Bryan was working on—"the Union meeting came up and I asked him if he was going to the Union meeting." O'Bryan replied, "of course." Vogt said, "Good," and remarked that it's "good to have a good employee over [there]." After the meeting Vogt asked O'Bryan about attendance at the meeting, inquiring, according to Vogt, "were a lot of people there," and O'Bryan told him it was "standing room only."¹⁴

¹⁴Although asserting that he asked "nonchalantly," Vogt admitted the substance of these two conversations with O'Bryan.

June: AMT solicits employees for a weekend crew and for solutions to overtime issues

Vogt testified that in response to employees who “let us know that they didn’t like having to work every weekend,” on June 20, 2012, AMT posted a memo soliciting volunteers to form a temporary weekend crew of six people to work three 12 hour shifts, two of them between 11 pm Fridays and 11 pm Sundays. The memo stated that employees volunteering for this crew would receive 40 hours pay for 36 hours work. The memo stated that AMT anticipated the weekend shift would last for 90 days and stated that “our goal is to start this weekend crew as soon as possible.” The memo closed by stating:

If anyone has additional suggestion to alleviate the excessive overtime on these jobs please make sure to talk to Hart Vogt or Mark Alexander. If you are interested in volunteering to be on the Weekend Crew, please notify Marketta in Human Resource.

The Union was not notified in advance of AMT’s intention to solicit for or establish a weekend crew, or to seek suggestions from employees about how to alleviate excess overtime.

Six employees volunteered for this weekend crew duty. However the weekend crew was never implemented. AMT found an additional machine to run during the weekday, and orders were less than expected, alleviating the pressure to work weekend overtime. Elliott sent letters to the volunteers thanking them for volunteering but informing them that the weekend crew would not be necessary at this time. She added, “[I]f we see the need to further investigate the idea of a weekend crew in the future, we will give you the opportunity to be on the crew at that time.”

Bargaining resumes

Pre-bargaining correspondence and proposals

On June 20, 2012, the Union filed unfair labor practice charges against AMT. On June 22, Cutler wrote to Vogt requesting a resumption of negotiations and suggesting dates for meetings in late June and early July. Cutler asked for a proposal from AMT as a response to the Union’s proposal from the February meeting. In a separate letter, dated June 25, Cutler requested, essentially, an update of the information he had requested and received from AMT in January/February. Wiese responded, agreeing to “pencil in” the suggested meeting dates of July 25 “and if productive July 26th.” Wiese took issue with Cutler’s assertion that it was AMT’s turn to provide a proposal:

As to your statement as to a proposal you presented last Feb 9th, we assume that you are referring only to the old MKM Machine contract demand which you simply redlined a name change to Advanced Metal. Our meeting notes show, we rejected that proposal as it was under which MKM Machine financially failed, collapsed, and permanently closed its doors. That contract is dead. We advised AMT would not be able to accept anything similar to that whatsoever. We also countered that proposal with our proposal indicating that we were open to

negotiate from a blank page to meet the wishes and desires of our employees. We believe AMT has done just that and they were happy working at AMT. If you have a counterproposal for them, we look forward to your presenting it for our review.

5 Cutler responded, July 19, stating that the only counterproposal the Union had received was "a blank sheet of paper, which is no contract at all." Cutler indicated that the Union was willing to negotiate changes to its offer, which was essentially the old MKM-Union contract. Cutler asked for AMT to provide specific proposed changes to that MKM-Union based proposal and suggested that at negotiations, the parties go through each item of the proposal and see where they can find "common ground."

15 Wiese responded stating that "we are very disappointed at the lack of effort and diligence you and the IAM are taking." Wiese wrote that "We are seemingly having a failure to communicate." Wiese explained that on February 9, AMT rejected the Union's proposal based on the MKM-Union contract and that "[w]e then explained we were offering to negotiate from a blank page, no prior requirements, but that we would not consider the MKM Machine/IAM agreement." Wiese then explained that AMT had provided an "extensive proposal" in the form of the materials distributed to employees on November 29, which has not been considered by the IAM. The letter accused the Union of bad faith and asserted that employees "are asking AMT for a future. They know that the IAM has done nothing but have one 3+ hour meeting in 8 months while they shoulder all the work."

25 Wiese's letter continued:

30 We asked the IAM to make good on the health insurance MKM/IAM promised its employees. You said the IAM would not support its commitment to that contract either. Why would you now then present it to AMT if even the IAM won't honor it?

35 AMT will continue to make its good faith efforts to meet the declared and stated wishes of the AMT employees and also meet all of its legal obligations under the NLRA. This is the same statement we made to the employees on November 29, 2011. We stand by our commitments.

40 Then, Wiese's note introduced a dichotomy that AMT would use henceforth in negotiations: certain subjects it denoted as "outside of contract negotiations" or "non-contractual." Wiese wrote,

45 We just recently sent a series of items to IAM Mr. Stivers for immediate discussion and resolution which are items outside of the contract negotiations. Those items need to be addressed immediately with the IAM. But of course, for contract negotiations, AMT or the IAM can present entirely different proposals on the same topics for inclusion in any potential agreement. In no way are those items a commitment by any party to keep those items in the same form or even an offer to even include them at all in a potential agreement. Of course, you will agree that everything should be subject to change, improvements, and better effort for the future.

Finally, Wiese's letter stated that "although the IAM has offered nothing in 8 months," AMT was including "some initial draft concepts for contract consideration," which it offered "on behalf of the employees expectations and desires."

5 These were the first contract proposals by AMT.

These proposals included the following:

10 The agreement would be between AMT, the Union, and the employees.

On its cover, the agreement stated that it was effective on the date signed and continued "until cancelled by the Company." This cover "duration" clause was at odds with the duration clause contained in the proposal, which provided for 60 days notice of cancellation by each party and then, also appears to provide for one year automatic renewal periods.

15 The proposal included adoption of AMT's quality statement, its mission statement, and its "corporate values", which included aphorisms such as "Blessings masquerade as problems" and "Honor God in all you do."

20 A management rights clause that provided for AMT to set all "policies, working rules, employment guidelines and procedures and all other conditions of employment." The management rights clause provided AMT the sole and exclusive right to fire, transfer, reassign, demote, layoff, recall, discipline, subcontract, have supervisors perform bargaining unit work, change modify or eliminate work rules, policies, benefits, and practice and procedures relating
25 to employees. Perhaps the only limitation on management rights was that it promised that no employee shall be disciplined, discharged, or suspended without pay "for arbitrary reasons."

Article 2 was the union recognition and representation provision which the proposal stated was "to be determined if included upon supportive documentation info request c001." The information AMT was seeking, and upon which its proposal conditioned inclusion of the recognition proposal, was the union producing its NLRB certification. The substance of the proposed recognition clause was limited to recognition of the Union as the representative of "dues paying" employees only. Thus, the proposal granted "the IAM certain limited rights of union representative successorship . . . to act as the sole and exclusive representative of the
35 dues paying members of Lodge 681."

In addition while the MKM bargaining unit described in the last contract had covered "all employees," with the exclusion of office clericals and salaried employees, the proposed AMT unit excluded office employees, administrative, shipping-receiving, outside sales, quality, as well
40 as supervisory and salaried employees.

Much of the recognition clause was devoted to subjects other than recognition. Article 2.1 states, in part: "No employee is contracted to continue to work against their will, and that they have the right to terminate their relationship at will. That is their right." Article 2.2 then
45 states: The company also has the right to terminate the employer/employee relationship at will. That is the Rights of both parties in a Right to Work State." The full proposal stated:

Article 2
TO BE DETERMINED IF INCLUDED
50 Upon supportive documentation info request c001

2.1: The Company, the Union, and all of AMT's employees recognize that the State of Indiana is a Right to Work State and that no employee is required to join a union or pay union dues to work at AMT. No employee is contracted to continue work against their will, and that they have the right to terminate their relationship at will. That is their right.

2.2 The company also has the right to terminate the employer/employee relationship at will. That is the Rights [sic] of both parties in a Right to Work State. However, the Company will grant to the IAM certain limited rights of union representative successorship based on the fact that certain past employees of another employer at the same location previously, to act as the sole and exclusive representative of the dues paying members of Lodge 681 through its District 27 of the IAM of the Employer, excluding office employees, administrative, shipping-receiving, outside sales, quality, and all supervisory and salaried employees, for the purpose of collective bargaining with respect to wages, rates of pay, hours of employment, and the adjustments of breach of this agreement which may arise between the parties.

Other notable features of the Employer's proposals provided to the Union by Wiese included a "merit pay" proposal under which the Employer would set starting rates at its discretion, with a minimum rate, and all subsequent increases would be at the discretion of the Employer. The Company' proposed an article on benefits that stated that "benefits will not be modified if at all possible, however the proposal also stated that the benefits "are not a fixed entitlement related to the term of this Agreement. The Company will give the union advance notice of any anticipated changes and will discuss such changes upon request."

The Employer proposed a no-strike clause, that (Article 12) that it titled "Indiana Right to Work State." It provided (Article 12.10) that any work stoppage by the union or employees would "void and moot" the entire agreement. It also provided (Article 12.2) that an employee "participating in any of the acts forbidden by this Section may be disciplined or discharged by the Employer at its discretion and such penalty of discipline or discharge shall not be reviewable or changed under this Agreement." Finally, the proposal (Article 12.3) provided that "Indiana is a Right-To-Work state and employees and Company may continue employment at will."

The Employer's "Shop Committee" proposal proposed to provide unpaid time off for union committee members "duly elected" by all "CBA members" to perform duties directly associated with this agreement.

AMT's proposal included a "General Welfare" provision, stating:

The officers of the Union and the employees covered by this Agreement agree to use all proper, sound, and logical reasoning to better the business of the Company.

In addition, there were other proposals offered, such as on work schedule, work days, and overtime; holidays, paid time off, bereavement, and attendance.

Wiese's reference to Cutler about the items sent to Stivers was a reference to a July 19 email sent to Stivers, but not to Cutler, that Stivers did not open until the evening of July 25. The email stated the following:

Pls see the attached letter of current issues for immediate discussion. These are not issues for our contract negotiations so I am sending them to you. These are current issues AMT wants to discuss with the IAM. None of these issues have been raised as concerns by the Union with AMT; not at the February 9 face to face meeting or at all in the seven months since AMT has been operating. We present these to the IAM.

Current contract negotiations are a separate issue to address. We will send to Mr. Cutler, Chief Negotiator, a response on contract negotiation issues.

We look forward to discuss these issues for our employees benefit to make sure everyone is in agreement and we are all heading in the same direction. We are also attaching some supportive details which will help clarify issues for your review prior to the meeting.

A second page listed 16 items, many of which had already been implemented. The second page contained an introduction to the 16 items that stated:

AMT thought the Union had abandoned the AMT employees and that the IAM was no longer seeking to be a successor union representative of this bargaining unit. AMT had not heard from the IAM since our last meeting on February 9th until your June 22 IAM letter requesting to Re-Start bargaining. If the IAM does seek to be considered by these employees as a successor union representative, AMT wants to immediately propose these changes and modifications consistent with the December 5, 2011 Initial Terms of Employment as further clearly defined in the detailed listing of Management Exclusive Rights which we supplied to you February 9th. These would be implemented expeditiously and not related to the contract negotiations.

This was followed by the 16 items, many of which, as noted, had already been implemented:

1. AMT wants to add a paid holiday for all workers -- New Years Eve

2. AMT wants to increase life insurance to 2x--instead of one times last year's annual comp

3. AMT wants to be able to give employees de minim us gifts IE: \$100.00, hats, t-Shirts, free lunches, or similar morale and spirit builders.

4. AMT wants to offer new vending machines, break room and coffee at a discount to .10 cents a cup

5. AMT wants to implement modifications to the attendance policy. @

6. AMT wants to provide tools for the production employees use so they do not have to buy them out of their pockets

7. AMT wants to allow employees to increase productivity (run 3, 4, 5 or more machines) to improve their ability to get larger merit pay increases. The better the operations perform; everyone will prosper.

8. AMT wants to offer voluntary employee insurance benefits—100% employee cost and their choice or option to participate or not. @@

9. AMT wants to offer a voluntary swing crew to work weekends to level out the OT demands and decrease the current forced Saturday work to meet customer demands. @

10. AMT wants to discuss revitalizing the old plant: remove all the old equipment, paint the plant, improve the lighting, to take down the racks, rearrange departments, keep the plant clean, paint the ceilings, paint the bathrooms, bring in new equipment, work to repair existing equipment, and repair the roof so that it doesn't rain on the employees.

11. AMT wants to improve the safety/product quality by restricting food and drinks to a new break room for the employees use and not allow employees to be distracted by using radios/ear buds during paid production time.@

12. AMT wants to propose offering a Jury Duty policy@

13. AMT wants to clarify the plant Production Operating Guidelines

14. AMT wants to implement the 401k which AMT included in our Initial Terms of Employment@

15. AMT wants to install personal lockers for any employees to store their personal effects such as cellphones, etc so they will not be on the production floor.

16. AMT wants to implement a Tuition Reimbursement policy@

July 25 bargaining

The parties met for bargaining on July 25. Erin Howard, a manager for AMT joined the Employer's bargaining team. The Union added two members to their committee, employees Jennifer Mayfield and Brian Rose. Recently the Union had filed a range of unfair labor practice charges and Cutler began the meeting by reading a statement to the effect that by meeting and bargaining the Union was not waiving or prejudicing any of its charges. The parties first discussed noneconomic issues. Referring to a proposal in AMT's July 24 proposal, Cutler said that AMT's mission statement was fine for it to have but the Union "did not think it was appropriate to actually put in the contract. Cutler also said that the Union would not agree, as indicated by AMT's July 24 proposal, that employees be party to the labor agreement. Cutler said "that's not the way collective-bargaining agreements are done." Wiese said "these aren't going to be traditional negotiations" and he said "this is not going to be a traditional contract."

The Union then gave AMT a set of contract language proposals, sent to the Employer during a morning break, covering parties to the agreement, management rights, recognition, probationary periods, strikes and lockouts, grievances, and seniority.

The parties first discussed management rights, which Wiese called the "heart and soul of the contract." Cutler told the Employer representatives that the Union's proposal used most of

the language proposed by the Employer but it removed “redundant” portions of the Employer’s proposal. However, the Union’s proposal provided for “just cause” limitations on the employer’s right to discharge or discipline employees, and required the Union’s agreement for significant changes to job content. Advance notice to the Union was required for many significant changes in the facility (such as suspension of operations). Later in the meeting Wiese asked for a “track change” version of this proposal, and Cutler arranged to send that to him.

The parties discussed the Union’s recognition clause, which provided for the employer’s recognition of the Union as the designated collective-bargaining representative for all employees excluding office clerical and salaried and/or supervisory employees. This was essentially the recognition clause contained in the last MKM-Union contract. The Union’s proposal removed the references the Employer had made to right to work, changes to the unit description, and references to the employees being at will employees. The Union’s recognition clause, unlike the Employer’s proposal, had the Union as the representative of all bargaining unit employees, not just those that were dues paying union members. Wiese said that the “right to work law” language should be in the recognition clause. Wiese asked, as he had in February, “what is the economic advantage to AMT to have a contract with IAM.”

The parties discussed the Union’s position that employees should retain their relative seniority earned at MKM. Wiese took the position that “this is a new company, and that seniority would start anew for everybody, and they weren’t going to give credit for the time they’d spent with MKM.” The Union took the position that the Employer received the benefit of the experience of employees who worked for so many years at MKM, that employees had expectations about seniority, and that it was a fair way to make distinctions.

Wiese claimed that the duration clause of the contract had been “TA’d” on February 9. Cutler disagreed with this. Cutler said the Union is open to discussing duration but “we needed to put in a specific terms of the contract, not just a day-to-day or cancelable on the Company’s discretion, as it had proposed in the first page, or the cover page of the proposal, where Mr. Wiese said effective date of signing until cancelled by . . . the Company.”

Wiese stated that he may put out proposals and if we don’t respond to it he may later make changes. Cutler acknowledged that both sides could make changes but that “the changing of proposals in a . . . negative way can be considered evidence of bad faith bargaining.”

Wiese reiterated that “employees should be a party to the contract.” He said that “they’re affected, and should accept the whole collective-bargaining agreement.” One of the Employer negotiators, perhaps Wiese, said that bargaining unit employees should sit in on the bargaining, he said it was “important that employees be included.” Cutler disagreed with this, explaining that “the Union was the representative of the employees—it’s not appropriate for individual employees to be actually at the bargaining table; instead they were speaking through their representatives.”

The parties then discussed management rights. The Union had added language that carved out an exception from the broad management power—the Union’s language limited management rights “where limited by this agreement.” Wiese said that he “doesn’t like that language, but said he would agree to it anyway.” The Union discussed its desire to remove demotion of employees from the unrestricted management rights, arguing that demotion should be limited to just cause, as with the Union’s proposal on discipline and termination. Wiese said that the ability to demote freely was “important” and tied to AMT’s desire to give unilateral merit

pay increases to employees. There was discussion about AMT's right to contract out or purchase parts. The Union wanted it limited to how it had been done in the past.

5 The parties then discussed the recognition clause of the agreement as proposed by the Union. "Wiese said no to the recognition clause, unless the Union furnishes him with official certification of the Union's exclusive representation." Cutler told him, and this had previously been discussed, that the Union had been recognized by MKM "many years ago, and that the "voluntary recognition was every bit as good and binding as an NLRB certification." Cutler told him "that to verify that, he should talk to his lawyer." Cutler indicated in discussion with Wiese 10 that the Union was willing to expressly exclude from the definition of the bargaining unit employees that were excluded in practice under MKM, such as office employees, administrative employees, outside sales, and all salaried and supervisory employees.

15 The parties discussed the probationary clause and if and when there would be a pay raise at the completion of the probationary period. No agreement was reached.

20 The parties discussed the no-strike clause. The Union wanted employees accused of violating the no-strike clause to be able to grieve the issue of whether or not there was a violation, but the union would concede that if a violation was shown, the employee could not grieve the amount of the discipline meted out. The Employer's position was that any violation of the no-strike clause would void the entire collective-bargaining agreement in its entirety. Wiese explained that AMT wanted the Union and employees to be required to report even a discussion by an employee about a possible breach of the no-strike clause. The Union would not agree to either of these demands. Then, later in the day, Wiese said that the Employer would agree to 25 having no no-strike clause and no no-lockout clause. Wiese said "we'll let the employees strike." Wiese then said he would agree to a no-lockout clause if the Union agreed that the Employer could continue to employ the employees as employees at will. The Union would not agree to this.

30 The parties discussed the grievance procedure. Wiese wanted employees to be able to file grievances against the Union under the grievance procedure, and for the Employer to be able to file grievances under the grievance procedure. Cutler said the Union did not have much problem with the Employer being able to file grievances for violation of the contract.

35 The parties discussed seniority, the number of days available to return to work after being recalled from a layoff, and whether an employee would be deemed to have quit if he was absent without calling in for a certain number of days. There was discussion about bumping rights and qualification needed for employees to bump.

40 Wiese brought up the issue of the email he had sent to Stivers on July 19 regarding the 16 issues that he called "non contract issues." At the conclusion of the July 25 meeting the parties determined that they would discuss these issues the next day in their July 26 meeting.

45 **July 26 Bargaining**

50 Cutler started the meeting by attempting to schedule future dates for bargaining. Wiese refused, and accused the Union of not bargaining. Wiese said he was concerned with the lack of productivity of bargaining. Wiese said, "[W]e need to step it up because he doesn't have time for this." Wiese accused the Union of "purposely not working" and accused the Union of bad-faith bargaining. Cutler and Wiese went back and forth about which party had failed to provide

proposals. Wiese said that AMT did not want to “schedule meetings that aren’t productive, that they’re simply a waste of time.” Wiese said he wanted the proposals electronically, so they did not have to be retyped.

5 Wiese said he would tape record the sessions, an issue he would return to repeatedly. He said he was unwilling to schedule future dates but would do so later in the session.

10 The Union provided the Employer with a counterproposal on the probationary employee proposal. The parties discussed probationary employees and the Union’s concern that under AMT’s proposal AMT would extend probationary employees’ status without providing for benefits. The Union was opposed to this.

15 The Union provided the Employer with a counterproposal on the Employer’s general provisions proposal, in which the Employer had proposed language to the effect that the parties would comply with State and Federal regulations and would educate and familiarize employees as required by State or Federal law. The Union added proposed language that the Employer would educate employee on hazardous materials that may be used in any areas of the plant. Wiese said this obligation should be “bilateral” and that the Union should be obligated to educate employees too. Cutler told him that the Union does not know what hazardous materials are in the plant and that “we don’t have a duty to educate employees, and it’s not nearly as feasible for the Union to do it, as it is for the Company.” Cutler asked if the Employer was proposing to add language that the Union too would educate employees about hazardous material, and Wiese said he would review it.

25 Wiese wanted to know how Cutler was paid, and whether he was fulltime with the IAM. Cutler said he was not fulltime and that how he was paid was irrelevant. Wiese challenged him, “[S]o you won’t tell me how you are paid?” Cutler refused. Wiese implied that Cutler was dragging out the negotiations.

30 Wiese raised the question of whether the Union represented a majority of employees. This had been raised before and the Union offered the same response. Wiese disagreed with the Union’s assertion that the Union is the bargaining agent by virtue of successorship. Wiese asked Cutler if the employees want the Union and Cutler said yes. Wiese replied, “[N]ot from what I’m hearing.”

35 The Union provided AMT with a proposal on the “shop committee” which was a rewrite of the proposal on the subject previously offered by AMT. The Union’s proposal provided for the Employer to pay union committee members for time spent performing duties on the shop committee. Cutler suggested that paying stewards helped to get grievances resolved more quickly, and that’s to everyone’s advantage. Wiese said “they don’t pay employees for nonwork time.” Wiese said, “that’s part of the problem with the whole country, that employees are paid for time they’re not actually working.”

45 Wiese said he would not consider the Union’s proposal until they know if the committee is appointed or elected. Wiese and Vogt said that “whatever counterproposal they’d give us will depend on whether the Shop Committee is elected by the employees, or whether its appointed. He said if the Shop Committee is appointed by the Union, then they would not pay the employees who were on the Shop Committee.” Cutler told them “that’s not how the Shop Committee’s selected. It’s not a matter that is for negotiations.” Cutler said “that was for the Union to determine how they select their Shop Committee or their stewards . . . it is not for

bargaining with the Company.” Wiese said he “would consider that in making the Company’s proposal on the Shop Committee.”

5 The parties then discussed holidays, and then discussed hours and overtime. The parties discussed overtime, and whether authorized time off would count toward overtime. There was discussion of going to 10-hour shifts and the Employer’s representative Howard said that if that was necessary, the Employer did not want to have to bargain with the Union about it. The Employer said it would draft a counterproposal.

10 The parties discussed the Employer’s attendance policy proposal, which was part of the “non contract” materials that Wiese had emailed to Stivers on July 19. Cutler indicated the Union was not opposed generally but wanted to modify it to allow employees to take last minute paid time off. Vogt and Wiese rejected that. The parties discussed different issues regarding attendance but no agreement was reached.

15 There was discussion of the union representatives having a plant tour and then the parties caucused for half an hour. The parties returned to the bargaining table at approximately 11:45 am. At that point the parties’ discussion turned to the 16 “noncontract” items that Wiese had emailed to Stivers on July 19. These involved a number of matters that the Union had filed
20 charges over involving unilateral implementation, and Cutler told the Employer that the Union would discuss them but they cannot be legally remedied at the bargaining table. Wiese said that they could be remedied by rescinding them. Cutler said that the Union did not want that, as a number of the unilateral changes were of benefit to the employees. Cutler said the Union would discuss them but was not waiving the unfair labor practices.

25 The parties went through the 16 items that Wiese had sent to Stivers, which Wiese had denominated as “noncontractual” and in most cases, concerned issues already implemented by AMT.

30 Item 1. The Union said that the Employer did not disagree with paying employees for New Years Eve as a holiday.

Item 2. The Union stated that it was not asking the Employer to discontinue the increase in life insurance that it had implemented.

35 Item 3. The Union stated that it did not object to the Employer continuing to give what it called “de minimis” gifts to employees, provided they were given to all equally. Vogt said that the incentive boosters are available to all equally, but not given to every employee. The Union did not object to that.

40 Item 4. The Union stated that it did not object to the Employer having the coffee in the new vending machines in the enhanced break room, and charging 10 cents a cup. The Union understood that under MKM and in the first months of AMT’s operation the coffee was free. Wiese disagreed and said that at first under MKM employees had to pay 50 cents per cup of
45 coffee.

Item 5. As to attendance, Weise said that they could rescind the attendance policy and go back to having no attendance policy, where they would terminate employees at their discretion. The Union said it was not asking the Employer to rescind the attendance policy at
50 this time. Wiese began to insist that he would rescind the policy and the Union objected. The

Union said it wanted to negotiate an attendance policy but for the time being would rather have the one unilaterally implemented than none at all.

5 Item 6. As to item 6, the provision of tools for employees, the Union said it wanted to discuss that internally before taking a position.

10 Item 7. As to item 7, which was AMT's desire to improve productivity, Wiese said that no response was necessary and there was no substantive discussion. Wiese did not appear to believe this was an item that was a subject of bargaining.

Item 8. As to item 8, the Union said it did not object to the Employer continuing to make the AFLAC benefit available to employees.

15 Item 9. The Union said that it needed to discuss the matter internally before it could respond to the weekend crew issue. Vogt said they would not be working this weekend so that discussion could be deferred.

20 Item 10. The parties agreed it was not a bargainable issue as long as the Employer was talking about rearranging departments physically but not about rearranging job duties.

25 Item 11. The Union told the Employer it opposed restricting food and drinks on the floor and opposed prohibitions on radios or ear buds while employees worked. Vogt said that the Indiana State inspectors had been brought in and recommended that food and drink not be on the shop floor and that the use of radios and ear buds should be discontinued. Cutler asked for a copy of the report and Wiese said he would provide a copy. Wiese also stated that he had sent a copy of the report to "your buddies," whom he identified as the NLRB. Vogt and Wiese mentioned that these provisions had already been implemented although they could not agree on how long ago. Cutler said that pending the Union's review of the OSHA report, the Union was not asking the Employer to rescind the new rules.

30 Item 12. This concerned jury duty, which had already been implemented. The Union said it was not asking the Employer to rescind its policy on jury duty.

35 Item 13. Wiese said these production operating guidelines had not yet been implemented. Wiese said they would be implemented August 2. Cutler said the parties would discuss it at the next session.

40 Item 14: The Union told the Employer that it did not object to the Employer continuing to offer the 401k plan.

Item 15: Vogt told the Union that lockers were installed for anyone who wants one. Wiese said this was given to the Union more for information than as an item of bargaining.

45 Item 16: Vogt said the tuition reimbursement policy had not yet been implemented. Cutler said the Union did not object to its implementation.

50 Throughout this discussion, Wiese stressed that he needed to know immediately if these items needed to be rescinded. As to the attendance policy he expressly threatened to rescind if he did not get Union's agreement to leave it in place by the end of the day. The parties recapped the items that were open for discussion. As to item 5, the attendance policy, Wiese threatened to rescind the policy that day because the Union had failed to adequately respond.

Then he gave the Union until July 26 to respond at which time he would rescind the attendance policy if he did not receive a response. Cutler responded by email on the afternoon of July 26 and agreed that AMT could continue to apply its attendance guidelines, while the Union retained its position on the unfair labor practice charge that it had filed over the implementation.

5 Moreover, the Union stated in the email that it would continue to negotiate for an attendance policy as part of a new collective-bargaining agreement.

The meeting ended with the parties setting new dates for bargaining.

10 **July 27 employee meeting**

The day after negotiations, Wiese and AMT management held employee meetings, one at 7 am for the first and third shift, and one for the second shift at about 3 PM. Wiese did most of the talking, although Vogt also spoke. In addition to Wiese and Vogt, and Elliott, Alexander, and other supervisors were present.

15 Wiese thanked and congratulated employees on the profitability of AMT. Wiese announced that Vogt would give an update on the business, customers, and equipment, and he, Wiese, would discuss "the union issue." Finally he would take questions.

20 Wiese's discussion of the union issues, based on the "script" he claims to have read to employees, was a passionate and aggressive defense of AMT and its interactions with the Union. He explained that AMT was required to negotiate with the Union, that it has done so, that Indiana is now a right-to-work state and you don't have to pay dues if you don't want to, and do not have to support the Union, "it's your choice." Wiese said "we will fight to preserve your individual rights and so should you." Wiese asserted that the Union's flyers to employees are not truthful or accurate and "I ask you to not pay any attention to them. I won't if you won't." According to employee Mayfield, Wiese said that the flyers the Union was handing out "were lies" and "not to believe" the flyers.

30 Wiese turned his attention to the 16 "noncontractual" items that had recently been provided to Stivers and discussed in negotiations. Wiese had Elliott and other managers hand out the sheet listing the 16 items that had been provided to the Union, but with certain of the items highlighted in colors. Wiese told the employees that these "are not contract issues but issues AMT wanted to address and implement. Many we had already done because we thought the union abandoned you." As employee Renn explained, Wiese presented these items as "some of the things that the Union didn't want in the contract." Wiese told the employees that about a week ago, "I gave this to the Union and told them I want to immediately implement these things for our AMT workers." Mayfield said that Wiese stated that "the IAM hadn't responded to any of those." Wiese stated, "[n]ow AMT is going forward with all of these. We have a business to run. Marketta make sure that the life insurance increase is effective Monday morning and the additional holiday is put on our AMT schedule."

45 Wiese said the unfair labor practice charges that the Union had filed against AMT for unilateral implementation are "making my life miserable." According to his script he said:

You will love the first one

50 The Union alleges that around December 16, 2011, AMT unilaterally changed working conditions when it distributed Christmas bonuses of \$100 to every employee.

The NLRB is implying I broke the law when I gave you 100.00.....If that is what breaking the law is I guess I need to collect that 100.00 back from you”

5 The Union alleges that around January 5, 2012, AMT unilaterally changed working conditions when it no longer provided free coffee to its employees and now also charges them .10 cents for a cup. Well if that is true I guess I will have to stop breaking the law and make it 50 cents a cup and stop subsidizing it 40 cents per cup. This is stupid.

10 The Union alleges that around early May 2012, AMT unilaterally changed terms and conditions of employment when it offered voluntary AFLAC Insurance options and a new 401(k) to employees. What they want me to stop the 401(k) match and take away your voluntary insurance? This is stupid.

15 Wiese told the employees that “the union had filed charges against him,” and according to Nichols, told employees “the union didn’t want AMT giving them \$100, didn’t want them . . . supplying coffee.” Mayfield testified that Wiese said that “I guess the IAM doesn’t want” the life insurance increase, the \$100 gift given to employees in December, the coffee for 10 cents, or
20 the voluntary insurance. Both Nichols and Mayfield testified that Wiese said AMT would be implementing a new tuition reimbursement policy. He also referenced the charge against the Employer for removing the union bulletin board. Wiese said “he wasn’t guilty of that but had he known it was the Union board he would have taken it down anyway . . . [be]cause there’s no
25 posting of any kind allowed in the building that aren’t through AMT that aren’t business related and approved.” As employee Renn understood Wiese’s speech, he was telling the employees that these 16 items were items that AMT had given (or were giving) to employees and that the Union objected and did not want them given because they are not in the contract.

30 Wiese then asked a series of rhetorical questions to the crowd (“Did AMT violate any of the employee rights?”) and declared that AMT was “guilty” of providing jobs and “caring for all the employees.” He said, “put me in jail if this is wrong. Or get off AMT’s back and let us be.” Wiese said that “the Union couldn’t offer . . . you anything better, they need to get off our backs.” He closed by telling employees that he is legally not allowed to demean and make derogatory
35 comments about the Union and he “will do my best not to do that” but, as Mayfield testified, “he did end up saying that I don’t like the Union.” Wiese told employees that “we don’t want to know about your union activities” and “we don’t care what you’re doing with the Union.” He said, “please do not tell us; as it I turned around and used against us. I don’t care about the union.”¹⁵

¹⁵Wiese testified that with the exception of answering employee questions, his comments at the meeting were confined to the “script” he prepared in advance. I believe that he followed the script closely, but I also believe the employee testimony about Wiese’s comments that were, for the most part, similar to the script, but with a few additional or differently phrased points. The account of the meeting set forth in the text of this decision reflects my findings of what was stated, and includes crediting of Mayfield’s, Nichols’, and Renns’ testimony that in a few cases was different than the wording set forth in the script prepared by Wiese. All three impressed me as credible and well-spoken witnesses endeavoring to recall events accurately. Their recollections of the meeting are not directly contradicted, except indirectly as Wiese maintained he read verbatim from his script and did not deviate from it until he answered employee questions. I believe Wiese relied heavily on his script. I do not believe he did not deviate from it at all. He is more confident than that, and the passion of the remarks would, I believe, lead him to deviate in small ways from his script to make his points.

Correspondence and Proposals

By letter dated July 30, Cutler wrote to Wiese regarding the 16 items Wiese had sent to Stivers on July 19, and which were discussed in the July 26 meeting. Cutler wrote that

[t]his will confirm and summarize the responses we gave you last Thursday to your July 19 emails to Billy Stivers with so-called proposals "for changes or modifications" in benefits or working conditions. In fact, AMT had already implemented most all of what AMT proposed.

Cutler's letter went on to discuss each of the 16 items. The letter concluded its discussion of each of the 16 items with the following:

You advised that all of these changes had already been implemented except for the Production Operating Guidelines and the Tuition Reimbursement Policy. As I pointed out at the meeting last week, because of AMT's unilateral implementation of many of these policies or benefits, true good faith bargaining must await an appropriate remedy from the [] NLRB. Nevertheless, as we advised you, the Union does not ask AMT to rescind any of the beneficial improvements it has implemented. The Union does, however, request AMT to bargain with the Union over any changes in wages, hours or terms or conditions of employment it wishes to make.

This letter also included a request for information. Cutler wrote:

The Union needs additional information regarding the weekend shift. Please inform us of the names of employees who have volunteered for the weekend shift [referenced in] Marketta Elliott's June 20 notice of employees.

On the afternoon of July 31, Wiese sent Cutler a series of six new proposals and 12 counterproposals on a variety of subjects. These were the Employer's August 1 proposals and counterproposals.

The new proposals were (1) visitation, (2) integration provision, (3) picket line recognition, (4) no Solicitation, postings, distribution, (5) safety, and (6) guidelines, rules and regulations.

With these proposals AMT began an effort to negotiate and later to unilaterally implement a ban on handbilling, and the distribution or display of union information or insignia. The proposal titled "No solicitation, Postings Distribution" barred solicitation "of any non-AMT business" and barred distribution of "any union information or any adverse information on AMT . . . in working areas, on company premises, or during working time." Similarly, postings of non-AMT literature, posters, buttons, etc., were banned under the proposal "without the signed dated authorization of the Company." To these prohibitions, the final provision of the proposal stated: "This in no way shall prohibit any individual employee the free exercise of his individual rights how he independently cho[oses]."

The new picket line recognition provision banned "handouts, buttons, . . . leaflets . . . or adverse public actions or, the like, that are conducted by the Union or their agents, CBU, on , at,

on the subject of AMT, or near the company's facility covered by this agreement."¹⁶ Any violation would "immediately terminate the agreement in its entirety." This provision contained the same proviso that "This in no way shall prohibit any individual employee the free exercise of his individual rights how he independently cho[o]ses."

In addition, the guidelines, rules and regulations included proposals that gave AMT the sole and unilateral right to maintain, determine and change at any time personnel policies with only a requirement to advise the union of changes and meet in advance if feasible.

AMT's counterproposals included an expanded general provisions (Article 17) proposal that prohibited "unwanted solicitation" by union members and bargaining unit employees generally towards "non-union member employees or management."

Its counterproposal on the recognition clause proposal (Article 2) appeared to now concede that the Union was the representative "pursuant to the N[ational] L[abor] R[elations] Act of 1935 for all of the employees"—not just for the "dues paying" employees—but it continued to exclude shipping- receiving and hourly quality employees from the unit. A drafting note was added demanding evidence of the Union's certification by the Board as a condition for proposing this recognition language.¹⁷ The recognition clause continued to be headed with a note that it was "to be determined if included upon supportive documentation info request" which pertained to the demand the Union produce certification of representation status from the Board. It continued to recite that the employees' relationship with the Employer was "at will" and a new section was now added, (section 2.3), that stated:

Failure of the Union to fairly and adequately represent the interests of non-dues paying members of the Collective Bargaining Unit shall constitute a violation of the Indiana Right To Work legislation and is a material breach of this agreement.

The management rights proposal rejected the Union's proposal that it notify the Union and act reasonably in taking unilateral action. The Union's proposal had stated that the employer retained the exclusive right to manage and direct the workforce "except where limited by this Agreement." The Union had included this after Wiese said on July 25 that he would agree to it. However, the Employer's proposal struck the language "except where limited by this agreement." The Employer's new proposal also included a drafting note that stated:

The Company will continue to make additions and modifications to the management rights clause as long as we cannot come to agreement. Fair warning. The quicker we can come to agreement will limit the necessity for

¹⁶CBU was defined in the Employer's proposed "Introduction" to the agreement to be the "Collective Bargaining Union" which was defined in the proposal to be a reference to the hourly work force at [the facility]." In other words, "CBU" was a reference to the hourly workforce.

¹⁷The drafting note stated in full:
DRAFTING NOTE: Company re-requests its February 9 Information request to substantiate the duly elected or duly recognized status of the IAM and the precise wording of the CBU definition as certified under the NLRA. This request [] was repeated at the 7/25/12 meeting. In the alternative, for Company consideration, pls provide the IAM legal position that it claims absolves the IAM of meeting this basic recognition. Without this Recognition, the company cannot support inclusion of the above statement in part or totality.

clarification of this clause. The longer and more difficult the negotiations, the more clarity the Company believes this clause will require.

AMT's cover page for the contract continued to provide for the effective date being "until cancelled by Company" and the cover page and introduction to the contract continued to name the "member of" the local union and the "Employees" as a party to the agreement.

AMT's counterproposal on strikes and lockouts contained a drafting note that stated:

IAM distributed buttons to all employees on July 24 and 25 and requested that All IAM union supporting employees wear those buttons at AMT. The company held employee meetings of Third and First and Second Shift. No buttons were worn or displayed by AMT employees. This is demonstrative evidence that the IAM lacks majority support by the AMT workers.

For this proposal, AMT now proposed either or total deletion of the no-strike no-lockout language, or, in the alternative, a restatement of its previous proposal, with far more provisions and stronger language added to provide that any violation of the no-strike provision, which now included merely a discussion of a violation of the provision, would result not only in the termination of the entire collective-bargaining agreement but void the Union's representation rights for two years. The Union could avoid this only through satisfying the Employer that it had provided details of all employees involved to the Employer. It also provided that discipline to employees for a violation were in the Employer's discretion and not reviewable.

AMT's counterproposals retained the language stating that the employees were "at will" employees and continued to assert that committee persons, including stewards and contract negotiation committee members would be elected, with all employees covered by the agreement (i.e., including those who chose not to be union members) having a right to vote.

The parties met the following morning.

August 1 Bargaining

This meeting began with Wiese providing a proposed agenda of subjects for the meeting. The parties began by discussing the list of 16 items emailed to Stivers on July 19, and discussed at the last meeting, and in Cutler's July 30 letter.

With regard to the weekend crew (item #9), Wiese said six employees had expressed interest in working the new weekend shift. Cutler repeated the request for their names, included in his July 30 email letter, and Wiese refused to provide them, asserting it was "not appropriate" to provide the names. Cutler disagreed, saying that the Union needed the information to represent the employees and for collective bargaining. Wiese responded by stating that "they don't believe that the Union has demonstrated that it represents the majority." The AMT negotiators agreed to talk with the volunteer employees and see if they would agree to have their names released to the Union. Wiese said it was the employees' "choice whether to release their names or not." Wiese asked why the Union needed the names and Cutler told him that "we may need to talk to them to see what their needs and concerns are regarding making a contract proposal on the weekend shift." Wiese said the company would check with the employees to see if they wanted their names released. Cutler told him, "[W]e're not asking them to check with the employees, we were asking for the names." Cutler told Wiese the Employer was obligated to furnish the information.

The Union also did not agree to the banning of employees' use of ear buds, as that recommendation was not reflected in any of the State safety reports that the Union had been shown, but the Union was waiting to receive an additional attachment to the State safety report that had not yet been provided.

After discussion of this, Wiese returned to his desire to tape record the bargaining meetings. The Union disagreed and stated that it did not agree to tape recording of meetings. Wiese called this a "unilateral veto."

There was discussion of the Employer workrules. At this point, Wiese again returned to the issue of the Union's majority support. Wiese stated that he believed that the Union had asked employees to wear union buttons on recent days but "he didn't see any buttons being worn by employees, and that showed him that the union lacks majority support." Wiese said "[C]an you provide us proof that you have majority support?" Wiese said that "[i]f he has that [he] can provide" the names of the six employees who volunteered for weekend work. Cutler told Wiese that as a matter of law the Union was the collective-bargaining agent. Wiese proposed an election to solve the question of "what he called a good faith reason to believe the Union does not have majority support, which he said is based on feedback from the employees." The Union refused and restated that it is the exclusive agent under the law and that AMT "is a legal successor." Wiese said he has a "good faith doubt [that the Union has] majority support. Will take a vote." Cutler said the Union won't agree and that the NLRB would put things back the way it should be. Wiese then said "he thinks that the Labor Board has misinterpreted the National Labor Relations Act." Wiese also stated, "I think you are in violation because you don't have the majority support." Wiese said, the "issue is [I] believe the IAM does not have majority support here. It is a critical issue 9 months after we started bargaining here."

After a break the parties returned to the table. The Union provided the Employer with some proposals on attendance policy, bereavement leave, and other issues. The parties discussed the issues. Wiese asked "rhetorically," "why should employees get paid for bereavement leave?" Cutler pointed out that this was AMT's proposal to have bereavement pay. Wiese said, "I think, but I'm rethinking this." Wiese said "it was the individual's responsibility and should be up to the individual to attend funerals, and take care of . . . the death of a family member or someone else on their own time." Cutler referred to it "as sort of the modern day social compact," and Wiese took issue with that and went on "at some length about" how "it's unfortunate that employees get paid for bereavement leave." When Cutler raised the example of an employee who may live far from the funeral and needs to take time off for travel, in addition to the funeral day, Wiese said "don't expect me to pay for the fact that [an] employee . . . lives far away from his family and has to travel to get there . . . that's the employee's choice." Wiese said he would include in the attendance policy, "Please don't punish me for someone dying." Vogt added that the "Government should pay employees for bereavement leave." However, despite these fulminations, Wiese agreed to accept bereavement leave and said he would put the information about it in the attendance policy."

A similar debate on jury pay developed. Both Wiese and Vogt said that the Union should pay part of jury duty. Either Wiese or Vogt said "they don't think the Company should pay for jury duty. Said they don't see an economic benefit to the Company of paying employees while they're serving on a jury. But he said that they would live with it, since they proposed it" (as part of the attendance policy proposal).

The parties discussed dues checkoff, proposed by the Union. Wiese wanted to know how many employees were paying dues, and Cutler said he wasn't prepared to give that information. Wiese said he would respond when the Union told him how many employees are currently paying dues. With regard to dues checkoff, Wiese said that "we're not in the business to support other companies doing their paperwork."

The parties discussed apprenticeship, benefits, wages and classifications. The Union accepted some version of a merit pay proposal but proposed a new minimum rate. Although AMT had proposed a minimum rate too (although lower than the minimum rate proposed by the Union) Wiese objected, stating that "if the best workers in the plant want to subsidize the worst workers, they can just write a check to them, instead of having it reflected in the contract."

The Union then accepted the AMT proposal on retirement, which was the 401(k) program, and on duration of the contract the Union proposed a two-year contract. Wiese said that AMT would agree to either a 60-day contract or a 10-year contract. Wiese said that the Employer liked "long-term stability" but "if we can't reach that, then we'll see."

After some verbal modifications of proposals by Wiese, the meeting ended.

August 8: The Employer refuses to provide the Union the names of employees who volunteered for the weekend crew

Elliott talked with the employees who had signed up to work the weekend crew. By Elliott's account, she told the employees:

We had been asked to disclose their names to the Union. I told them that we did not want to disclose their names unless they gave us their permission. Will you give us your permission to do that.

She also endorsed a slightly—but significantly—different phrasing suggested by counsel for the General Counsel: "We didn't want to disclose your name so we're asking you before we disclose your name if you give permission." Asked if she asked this to employees, Elliott answered "Uh-huh, yes." Asked if she said anything else to them, Elliott said, "No."

According to Elliott, five (of six) employees she spoke with indicated they did not want their names disclosed. She reported this to Wiese in an August 7 memo, which Wiese provided to the Union as an attachment to an August 8 letter to Cutler. In the letter, Wiese stated, "[a]s we indicated during the meeting, we do not see the relevance of providing the names in order for you to evaluate the weekend shift issue." He further stated, in reference to the memo from Elliott setting forth the employee responses:

Pursuant to the attached information, we further state our good faith belief that the IAM has totally lost its support of the employees and are not interested in the IAM being their designated representative. Here we just asked if it was okay to release their names to the IAM and we provided you their candid responses. Of the six, five so far have presented an adverse response to IAM representation. As we told you, based on our interaction with our employees on a day to day basis, we believe this small example is representative of the overwhelming employees feelings. As AMT twice requested of the IAM, if you have other information or facts to demonstrate that you do have majority employee support, pls provide it to us at the next scheduled meeting on August 15th to bargain for

an agreement with AMT. We are diligently working on our proposals for the meeting. We believe it critical to successful negotiations that we all have a clear understanding of the employees true desires and work to meet those desires. AMT is trying to present proposals to support the employees hard work at AMT.

August 15 Bargaining

The parties met again August 15. In the meantime the parties exchanged additional proposals and counterproposals, some of which are discussed below.

At the meeting the parties confirmed agreement on probationary employees. They signed a tentative agreement on a number of issues: such as probationary period, the 401(k) retirement, and the tuition reimbursement. They made progress on the Employer's proposal regarding visitation to the facility by union representatives and off duty employee committee members.

They discussed holidays without resolution. A proposal on access to the plant by union representatives was mostly worked through, with the parties needing to agree on the wording of a confidentiality clause.

The parties then discussed their competing proposals on a no-strike clause. The Union's proposal had deleted the "drafting note" included in the Employer's August 1, 2012 proposal, which stated that:

IAM distributed buttons to all employees on July 24 and 25 and requested that All IAM union supporting employees wear those buttons at AMT. The company held employee meeting[s] of Third and First and Second Shift. No buttons were worn or displayed by the AMT employees. This is demonstrative evidence that the IAM lacks majority support by the AMT workers.

AMT's August 15 proposal deleted the option (proposed on August 1) of having no no-strike clause and proposed the "alternative" proposal from August 1, which provided that any violation of the no-strike provision, including merely a discussion of a violation of the provision, would result not only in the termination of the entire collective-bargaining agreement but could void the Union's representation rights for two years, and rendered any discipline under the provision not subject to the grievances procedure.

In their discussion, AMT took the position that it did not want to make the question of whether or not an employee, in fact, engaged in a violation of the agreement to be subject to the grievance procedure. Wiese said that if an employee wants to, he can sue the Employer after being fired. Cutler said that is the function and role of a grievance procedure to determine violations of the contract. The Union's counterproposal rejected the Employer's provision requiring the Union to provide the names and details about any individual participating in a breach of the no-strike clause. Wiese said he wanted to leave that in. Cutler pointed out that this demand was not part of the Employer's original no strike proposal but had been added.

The parties turned to the proposal entitled government compliance. They discussed the Employer's addition of language, not contained in the Employer's original July 19 or August 1 proposal on the subject, stating that there will be no harassment, threats, abuse, intimidation, or unwanted solicitation by union members or bargaining unit employees against non-union employees or management. Elliott, who had begun attending meetings August 1, justified the

proposal by stating that with Indiana becoming a right to work state, this was a "new era." Wiese said the Employer would make a proposal on this subject.

5 The parties turned to an integration proposal that had been advanced by the Employer. On August 1. This proposal not only rendered all past practices, "prior words . . . written or spoken . . . nonexistent" but also contained language stating that "[n]either party has executed this Agreement in reliance on any representations, warranties, nor statements by the other party hereto other than those expressly set forth herein." The Union's proposal rejected these provisions and Cutler observed that "a lot of things that the Company had proposed and that I 10 had deleted on the integration provision are more common to a commercial contract, rather than a Collective-Bargaining Agreement." Wiese responded that "he wants to make this a commercial agreement" and noted that "we can't agree on what was said in . . . earlier bargaining sessions." He raised again his proposal to tape-record the bargaining sessions. The Union rejected that. Wiese then said he did not want to have any binding past practices in 15 the contract.

After a discussion of hours of work and overtime, the parties turned to management rights. Wiese stressed that he wants to be able to contract out for work, wherever he decides. Near the end of the discussion, Wiese said that "[I] highly recommend that you seriously 20 consider our Mgmt rights proposal. Going to be the best you get. Fair warning."

The parties discussed AMT's proposal to have the employees be party to the agreement. Wiese asked the Union to identify who the IAM is, "its legal identity." Cutler told him it is an unincorporated association. Wiese said that did not answer his question. At some 25 point, Wiese stated that the "IAM does not exist as a legal entity."

The parties discussed the grievance procedure, and their proposals on whether employees should receive pay for union-related work, something advanced by the Union and opposed by the Employer. The parties turned to the subject of union recognition. Wiese stated 30 that he had requested information about the Union's certification and that "he won't change the Company's position until he gets that information, a certification from the Labor Board." Wiese and Cutler again debated whether the Employer was required to bargain based on a recognition rather than a certification.

35 The parties discussed safety, took a break and returned to discuss the cover page and introduction of the agreement. The Union again insisted that the parties to the contract are only the Union and the Company and that Wiese's "insistence on making the employees a party to the contract may well . . . hang up an agreement." Wiese said he "wanted the Union to sign on behalf of the employees." He also said that the "Union does not exist as a legal entity." Later 40 that afternoon, in a continuation of discussion of this subject, Wiese made a verbal proposal that continued to name the unit employees as a party to the agreement.

After that the parties discussed the management rights clause again. Wiese agreed that the Union's proposal that management rights were limited by the agreement was accurate, but 45 contrary to what he had said on July 25, now "said he cannot "live with" such limiting language in the agreement.

The Employer's latest proposal, while protecting the Employer's right to "contract out any work that is necessary to perform its business activities as it solely determines," also said for the 50 first time that "The Company will make every effort to avoid layoffs or denial of overtime opportunities caused by contracting out." In the meeting, Wiese stated that "every time he

hears a proposal . . . from the Union, it makes him want to clarify the management rights clause.” At the conclusion of the conversation on management rights, Wiese told the Union, “[I] highly recommend that you seriously consider our Mgmt rights proposal. Going to be the best you get. Fair warning.”

After discussing a few other items the parties turned to the no-strike proposal. Once again Wiese stated that when the Union deletes something from the Employer’s proposal, “he reviews it he spices it up. Looks at it harder.” The Union said it could not agree, as proposed by the Employer, that if there’s a breach of the no strike clause the entire collective-bargaining agreement was voided, including the IAM’s representation rights for two years. Cutler told the Employer that “we could not agree to give up our bargaining rights.” Wiese said, “we don’t want to stop the IAM from doing business, just from doing business with AMT.”

The Union also told the Employer that it could not agree with the Employer’s language in its proposal that the Employer could continue employment at will for employees.

The parties discussed the picket line recognition proposal of the Employer, resubmitted that day, August 15, and which stated in part:

There shall be no information pickets, handouts, buttons, Union promotional data, handbilling, leaflets or flyer distributions or adverse public actions or, the like, that are conducted by the Union or the agents, CBU, on, at, on the subject of AMT, or near the company’s facility covered by this agreement. This in no way shall prohibit any individual employee the free exercise of his individual rights how he independently chooses.

Any such interruption or disruption is a Material Breach of this agreement and shall immediately terminate the agreement in its entirety. The IAM shall be responsible for any direct or consequential damages whether to AMT or to AMT’s customers or the necessity of the Company to offset the costs of any such disruptions.

The Union was unwilling to accept the Employer’s picket line recognition proposal but did state that it was willing to consider prohibiting employees from having the right not to cross a picket line of another striking union.

The parties discussed AMT’s “No solicitation, Postings, Distribution” proposal. The proposal prohibited distribution of “any union information or adverse information on AMT of any nature . . . on company premises, or during working time.” It also prohibited buttons and other “postings” without the signed authorization of the Company consistent with Company policies.” Union committee member Mayfield asked, “I can’t have an IAM bumper sticker on my car?” Wiese replied, “Not if you agree to this agreement.” But Wiese said it did not prevent university or high school stickers. Wiese accused handbillers, and Cutler in particular, who admitted to assisting in handbilling during the spring, with hurting the business, and he told Cutler, “you suck.” More generally, Wiese asserted that “union contracts are crap and they hurt business.”

Subsequently, the parties discussed the Employer’s proposal “union representation at AMT” which included a provision that “this agreement covers all of the employees and all covered employees shall have their right to vote for their representative committee person.” When questioned about this, Wiese said that “the Union needs to show that it represents a majority, and he wants to be sure that the Union does.” Cutler said the Union would not agree

to an election of committee members. Wiese replied that “he would not agree to recognize the Union without a showing of majority support.” Wiese said that “he doubted the Union’s majority status, and said” We are at an impasse. Not going to allow an agreement that is not supported by the employees.” Wiese repeated this “impasse” claim when Cutler said the Union would not negotiate on the Union’s determination of who the committee people or stewards would be. Wiese insisted that “the Company would deal with a steward who has . . . at least 50% of the vote behind him.”

August 23 posting of proposals with annotations

On August 23, AMT posted a copy of its August 1 proposal with handwritten annotations by Wiese. On the cover page setting forth the parties to the agreement, the IAM (International) was struck out in pen and, Wiese wrote: “Company asked to add employees—Union rejected.” On the page of the proposal setting forth the proposal on union representation at AMT, a portion of the proposal references “the duly elected representative on the Shop Committee or steward . . .” Wiese circled “duly elected” and wrote in the margin, “Company insists for you.” Wiese also wrote on the bottom half of the page: “Company rejected shop steward being appointed by IAM. AMT insists employees be given their right to cho[o]se and vote. Don’t take away employees rights!” [Original emphasis.]

August 26 interrogation

On August 26, second shift supervisor Dustin Higgs approached employee Matthew Nichols as Nichols was talking with another employee and clocking out for the day. Higgs asked Nichols if he “was going to a union meeting.” Nichols testified that he was “stunned” and he walked away without responding.¹⁸

August 28 bargaining; implementation of the no-solicitation no-posting work rule

The parties met again August 28. Cutler was no longer in attendance and no longer the Union’s chief negotiator. He had been replaced by IAM business representative Stivers, who had attended each of the meetings. The parties met for about three hours.

The parties first discussed two “plant” items (as Wiese described them) that the Employer had sent to the Union on August 23 and had called “urgent bargaining items.” One was an employer proposal sent to the Union on scheduling an unpaid day to close the plant. No agreement was reached.

The second was the Employer’s proposed no-solicitation policy, this time prepared as a “work rule” for immediate implementation. The proposed work rule stated:

There shall be no solicitation by any person of any non-AMT business to employees at any time on company premises inside or outside the building, parking lot, etc. There shall be no distribution of any Non-AMT information or any adverse information on AMT or of any nature in working areas, on company premises, or during working time/paid time.

¹⁸Nichols testified about this incident credibly. Neither Higgs nor the employee identified as being with Nichols when this incident occurred testified.

There shall be no postings of personal items, or any non-AMT literature, notices, posters, buttons, signs, displays, or any other items without the signed dated authorization of the Company consistent with Company policies. For clarity, this would not include school, college, pro team or similar wear in good taste. Inappropriate wear which may be considered vulgar, offensive or which is not conducive to a team work environment, that may be considered by the Company in violation of the "No Harassment Policy" implemented December 5, 2011, would not be permitted.

Wiese said "we need to implement this now before the contract." He stated, "We pay the bills. We keep the lights on. We make the rules in our house." Wiese said "anything that would have an adverse effect on the employees was considered against this work rule." Porter asked Wiese if it would apply to union apparel such as buttons or hats. Wiese said, yes, "you can wear whatever you want on your premises but not on Company premises." Porter said that was "not agreed" and mentioned that "the local might buy everyone a [union] shirt." Stivers asked Wiese if, under the policy, he could go out on the shop floor with the IAM shirt he was wearing, which had a quarter coin size IAM emblem. Wiese said no, it would not be acceptable. Wiese justified the rule this way: "it was his house. . . . If I came to Alabama to his house, and he may or may not let me in his house. That it was his house, he had the right to dictate, if I had muddy boots or shoes, he would make me take my shoes off before I was allowed to come into his house." Porter, told Wiese the Union didn't agree and that he thought it was illegal and a violation of the NLRB policies. Porter said, "the Union is here, the company is here. I don't see problem. I agree that vulgar is not appropriate. But as far as the Union logo. I don't see that falls within vulgar." Wiese said, "[W]e understand your point. We don't agree." Wiese said "[W]e are going to implement the policy. Just so you are aware."

In fact, as Wiese testified, the rule was implemented, posted, and maintained in effect, from that day until November 27, 2012, when Wiese had the words "cancelled & void" handwritten across the text of the posted rule in the plant.¹⁹

The Union provided the Employer counter-proposals on safety, management rights, recognition, and the grievance procedure. Stivers testified that the Union, mindful of Wiese's "warnings" that "it wasn't going to get much better" tried "to move forward on some things." These proposals, in each case, involved working from the Employer's proposal, and accepting far more of the Employer's language than in the past, while continuing to maintain certain core demands, such as that the Union (and not just the Employer) would appoint some members of

¹⁹Despite the maintenance of this rule, a bargaining unit employee Logan Clark wore brightly colored shirts to work bearing anti-union messages most days during the time this work rule was in effect, in open sight of supervisors and managers. In mid-September 2012, employee and union committee member Mayfield questioned Plant Manager Alexander about this, telling him: "I've got several people coming to me asking me why it's ok for Logan to wear his anti-union shirts and that we aren't allowed to wear our views and our opinions on our shirts." Alexander said that he would find out, and talk to Wiese and Vogt. A few days later Alexander reported to Mayfield that Wiese and Vogt would discuss it at the September 20 meeting. As discussed below, the meeting broke up before any substantive discussions and there is no evidence that the matter of the employee being permitted to wear antiunion shirts when prounion shirts were banned was ever addressed by management during the three months the work rule was in effect.

the safety committee, that discharge and discipline must be for just cause (and not merely non-arbitrary as proposed by the Employer), that employees not work as “at will” employees, and that the recognized unit conform to the historic bargaining unit definition. (Compare GC Exh. 109 to GC Exhs. 130-133.).²⁰ These items were “barely discuss[ed]” at the meeting. The parties reached tentative agreements on bereavement pay and the “integration provision.”

Wiese again raised the issue of recording the meetings. He complained about “frivolous” Board charges being filed by the Union. Porter suggested that if “we could get our union bulletin board back” that he would look at trying to resolve some of the NLRB charges. Wiese responded that the Union could “file more charges” and that he was not going to be hit by a “two by four”.

Wiese again raised the issue of the Union’s alleged lack of majority support stating that judging from the attendance at meetings he did not believe the Union had majority support. Porter asked Wiese, “so are you telling me that you’ve been surveilling our meetings?” Wiese did not respond.

Further correspondence and proposals

The next day, on August 29, Wiese sent an email to Stivers complaining that negotiations were unproductive and that “AMT was disappointed that IAM only covered 4 items at our session yesterday.”

Wiese added: “We cannot continue to waste unproductive time. The IAM has had over 9 months to present itself to the employees. We are doubtful that the IAM has the support of these workers.”

²⁰Thus, previously, the Union had proposed its original recognition proposal, but now it accepted AMT’s proposal, removing (1) language stating that the “Company has the right to terminate the employer/employee relationship at will,” (2) the (false) statement that at will status is a right “of both parties in a right-to-work state, and (3) removing the exclusion of shipping-receiving and hourly quality employees from the recognized unit. The Union’s grievance procedure proposal moved toward AMT’s proposal. The Union modified some language of AMT’s proposal designed to permit employees to go through the grievance arbitration procedure without involving the Union, and the Union removed the “loser pay” provisions from arbitration, proposing instead that the parties share the cost of any arbitration. On management rights, the Union accepted AMT’s first paragraph in its entirety (Article 3.1, GC Exh. 131) which it had previously rejected. This meant the Union was, among other things, conceding that the breadth of the management rights clause would not be constrained by adherence to past practice, as AMT was given the express right to ignore all past practices. However, the Union still opposed AMT’s effort to have the right to have the discretion to change, and modify all rules and practices at any time, to have the right to contract out work, assign employees, and combine jobs, beyond that established as a past practice. The Union still opposed the Employer’s demand that supervisors be permitted to perform bargaining unit work without restriction; the Union proposed that it be limited to “emergency reasons.” The Union also continued to propose “just cause” be required for adverse employment actions against employees. However, it gave up its demand to be given advance notice and an opportunity to discuss significant changes in job content. The Union’s proposal on management rights also eliminated the much discussed “except where limited by this Agreement” limitation on management rights, although, arguably, other provisions of the proposal achieved the same result.

Wiese also attached counterproposals and/or suggestions on the four proposals offered at bargaining by the Union. In the safety proposal, AMT continued its demand to control who was appointed to the safety committee. In management rights, it continued to reject a “just cause” standard for discipline and discharge of employees; continued to propose that nonunit individuals be permitted to perform work “at any time.” It reemphasized its right to contract out “as it solely determines, and removed language it had previously proposed stating that (while retaining sole discretion to make contracting out decisions) it would “make every effort to avoid layoffs or denial of overtime opportunities caused by contracting out unless economically needed.” Now the proposal paid no heed to layoffs or lost overtime. The proposed recognition clause finally removed the exclusion of shipping-receiving, and quality employees from the bargaining unit, but the drafting note and the “to be determined if included” proviso, continued to condition the entire recognition clause on the Union providing evidence of its certification by the NLRB under MKM or a legal position “absolving the IAM of meeting this basic recognition.” Moreover, for the first time, the centerpiece of the recognition language (Article 2.2, GC Exh. 134 at 10) now stated that “the Company will grant certain limited rights of union representative successorship “based on demonstrated majority support for the elected Union”—seemingly a further requirement that if the recognition provision was accepted, its terms would require the Union to demonstrate majority support through an election in order to be recognized.

Stivers responded to Wiese by letter dated August 31, defending the Union’s conduct. His letter included a request for the “rates, schedule of benefits, deductibles and max out-of-pocket comparison from the old MKM policies to the current AMT employees.”

Wiese responded by email dated September 10. He wrote that AMT

reject[s] your statements in that letter in their entirety. It is merely a continuation of the IAM do nothing, no representation, no effort, no work and no support of the AMT employees which we have documented and chronicled now for the past 9 months.

AMT’s employees are not intimidated or frightened for their jobs. It is just the opposite. They are excited about their future except for an albatross that they are required to wear . . . required by legal hangover of a successor union that they don’t want. Billy, you do not need to waste your time trying to document a file for me. We know the truth; we know the employees; and we know the productivity level of the IAM.

With regard to Stivers’ request for health care information, Wiese responded:

As for MKM Machine information you need to get that from your prior members and the IAM can compare it as easily as AMT could compare the information. AMT has no MKM benefit or other comparison information. AMT never generated or compared our Initial Terms of Employment data to MKM’s benefits. As for AMT information we gave it to you February 7, 2012. At the February 9th meeting when you saw the 81 pages of benefits, plan description, costs, etc. you said **“Bob, I had never seen this before; it looks good; we are not far apart as I thought”**. That is when Cutler ended the meeting abruptly. After you review all the past data already supplied to the IAM, If this does not fully satisfy this information request, please put into writing what you are specifically wanting that AMT has not given previously, and we will provide it if we have it. [Original emphasis.]

September 20 Bargaining

5 The parties met for bargaining again on September 20. The meeting did not last long.
 10 The meeting began with Wiese reading from a piece of paper a statement that “AMT will be tape recording all further bargaining sessions.” The statement asserted that “AMT is unable to speak freely and openly at the bargaining session[s] . . . because the IAM has filed frivolous claims after every session.” The Union objected and Porter told Wiese that the Union would not agree to that. The parties caucused. After about ten minutes the parties returned and Porter informed
 15 Wiese that the Union would not agree to the tape recording and if he insisted then the Union would not meet. Wiese said, “so you’re refusing to bargain?” Porter said, [N]o, but they are refusing in the face of the insistence on tape recording which he described as a unilateral change in conditions of bargaining. Porter said, “[A]re you refusing to bargain. . . will you turn it off?” Wiese refused to remove the tape recorder. He said “he was going to record the
 20 meetings, whether we agreed to it or not.” The Union left, stating that it could not bargain under the conditions set by Wiese.²¹

The parties did not meet further and had not met as of the close of the hearing in this matter.
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Further developments

In its September 20 proposals, which went undiscussed, the Employer maintained its proposals. (The recognition proposal removed the “to be determined if included, upon
 25 supportive documentation” legend, but retained the drafting note requiring production of the NLRB certification or IAM’s legal position as a condition of acceptance—it also maintained in the text the recent change to condition recognition on “based on demonstrated majority support for the elected union.”)

30 On November 27, 2012, Wiese wrote to Stivers, stating that “in order to eliminate any excuse by the Union to further avoid its bargaining responsibilities, AMT advises it will not use a tape recorder during future bargaining sessions, unless the Union agrees to such use.” The letter then asks for dates to resume bargaining. Stivers’ response accused Wiese of “stall[ing] the negotiations with your tape recording stunt” and continues:

35 You are now faced with violations of Federal Law. So now you are attempting to dig your way out of your hole! This is evidenced by the rescinding of your unjust solicitation policy. For the sake of our membership and the workers we accept your offer to return to the bargaining table.
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The letter also stated that AMT needed to provide the Union with, among other things, the “Total actual cost of all insurance coverage information (ref: cost for Employee, Employee and Spouse or whatever options are available for employees with the exact current actual employee cost and the current actual cost to the company.)”
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²¹During the hearing, Wiese continued to argue in favor of tape recording, responding at one point to counsel’s questions about what he had stated at a meeting: “If I could refer to a tape recording I’d tell you exactly what was said.”

Stivers' letter also asked for a response on the Union's request to meet at alternating Employer and Union locations, and a response to a previous Union request to use the FMCS for further negotiating sessions.

Wiese responded by letter dated December 12, accusing the Union of "dictating a bargaining requirement" (as the Union had accused Wiese when he insisted on using the tape recorder) by asking for the health insurance information. Wiese claimed that it had been provided on February 9, 2012. Despite much equivocation by Wiese in his testimony, there is no evidence or reason to believe that the June 2012 renewal rates were ever provided to the Union.

Analysis

The General Counsel alleges an array of violations by the Respondent. I will consider each in turn.

Independent 8(a)(1) allegations

¶9 of the complaint

Threats and interrogation by Elliott

Paragraph 9(a) of the complaint alleges a violation of Section 8(a)(1) of the Act based on a posting on the break room bulletin board that threatened employees that they would not receive incentives if they supported the Union. No evidence was presented as to this allegation and it is dismissed.

Paragraph 9(b) alleges that AMT violated Section 8(a)(1) of the Act when Elliott asked the employees who volunteered for the weekend crew whether they objected to Elliott providing their name to the Union, as the Union had requested.

The General Counsel argues that Elliott's polling of employees' for consent to tell the Union they volunteered for the weekend crew constitutes an unlawful interrogation to gauge the employees' support for the Union.

As discussed below, it was a violation of the Respondent's obligations under Section 8(a)(5) to condition furnishing of the employees' names upon the employees' consent. But that is a different question from whether the questioning itself is an independent violation of Section 8(a)(1). The issue is whether the statements to employees would have a reasonable tendency to coerce them.

By Elliott's account, she told the employees:

We had been asked to disclose their names to the Union. I told them that we did not want to disclose their names unless they gave us their permission. Will you give us your permission to do that.

Elliott also endorsed the suggestion of the General Counsel that she told employees: "We didn't want to disclose your name so we're asking you before we disclose your name if you give permission."

The question of whether an employer has violated Section 8(a)(1) of the Act is an objective one.²² The inquiry is whether the disputed statement or conduct would reasonably tend to coerce or interfere with employee rights. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1204 (2007); *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Rossmore House*, 269 NLRB 1176, enfd. 760 F.2d 1006 (9th Cir. 1985). Whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB at 1178; *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Rather, the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The Board has noted that the context in which statements are made can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466, 475 (2000).

In a context free of coercion and free of openly expressed hostility to the Union, I might dismiss this allegation. However, the context is particularly relevant here. Wiese's postings, announcements at meeting, all revealed to employees the Employer's hostility towards and willingness to malign the Union. Only a few weeks before Elliott's questioning, Wiese had relied upon the Union's objections to the Respondent's unlawful unilateral implementation of benefits to hold a veritable pep rally denouncing the Union for allegedly trying to take away employee benefits over the alleged resistance of the employer. There can be no serious doubt that bitter opposition to the Union was the official orthodoxy openly expressed by the Respondent.

In this context, a reasonable employee would feel coerced to avoid the implicit show of support for the Union attendant to an employee telling Elliott—the H.R. director—to accede to the Union's request. It is highly significant that this questioning required the employees to voice an opinion and affirmatively make a choice about giving the Union information. I do not think for one minute that the Respondent's or Elliott's preference for employees not to grant permission to reveal their names to the Union was lost on employees, and, indeed, in one version of the account of the conversations endorsed by Elliott, she made that plain. Given the context, and the lack of lawful rationale for the questioning, I believe that a reasonable employee would tend to feel coerced by what amounts to (whether intended as such or not) an interrogation into an employee's union sympathies. The employee would reasonably feel that pro-union sympathies could be implied by the willingness to grant permission for the Union's request. I find that Elliott's questioning of employees' was unlawful under the circumstances.

²²In considering the lawfulness of the Respondent's statements under an 8(a)(1) theory of coercion, the Board considers neither the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).

¶10 of the complaint
Interrogation by Vogt

5

and

Unnumbered allegation of the complaint
Interrogation by Higgs

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In paragraph 10(a) and (b) of the complaint, the General Counsel alleges Vogt interrogated an employee about his and other employees' attendance at a union meeting. The General Counsel alleges this to be a violation of Section 8(a)(1) of the Act. In addition, at trial, counsel for the General Counsel moved to amend the complaint to add an allegation of unlawful
15 interrogation by (admitted) Supervisor Dustin Higgs. The motion to amend was granted.

As to the Higgs interrogation, on August 26, Higgs approached employee Nichols as Nichols was talking with another employee and was clocking out for the day. Higgs asked Nichols if "I was going to a union meeting." Nichols testified that he was "stunned" and he
20 walked away without responding. The Respondent concedes (R. Br. at 111) that this is a violation of the Act, and I so find.

As to the allegations regarding Vogt's interrogation, the evidence concerns Vogt's conversations with employee O'Bryan. As recited in the facts, Vogt admitted asking O'Bryan if
25 he was going to the union meeting. After the meeting Vogt asked O'Bryan about attendance at the meeting.

As stated above, not every instance of questioning about union sympathies violates the Act. The totality of the circumstances must be assessed. While the Respondent admits (R. Br.
30 at 111) that "questions of this nature are usually deemed coercive," it contends that some factors here belie any tendency to coerce.

I agree that some factors support the Employer. The conversation occurred on the plant floor in the midst of a work-related discussion and was not hostile in tone (although I do not
35 accept or credit Vogt's effort to characterize the conversation as a "nonchalant" aside). And Vogt's follow-up questioning asked only about the attendance generally, he did not seek information as to who attended (other than, of course, O'Bryan). But other factors cut the other way and lead me to conclude that the questioning was coercive. Vogt was a very high ranking and important force at AMT. He and Wiese had come from Whitesell and were clearly the main
40 bosses in the eyes of the employees. I reject and discredit Vogt's suggestion that the questioning was casual or an aside. The issue of employee support for the Union was a central feature of the Respondent's attack on the Union at the bargaining table—with the Respondent harping on it incessantly as a purported basis for its bargaining positions. It is not credible that

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its intense interest in the Union's strength of support was not central to this conversation—the questions were serious and required an answer of O'Bryan.²³

Whether or not O'Bryan personally felt coerced or intimidated is irrelevant. For an employee, such as O'Bryan, who had not expressed any pro-union sympathies, there would be a reasonable tendency to feel coerced by having a high-ranking management employee approach him and ask whether he was attending an upcoming union meeting. This would be compounded, by being forced, after the meeting, to be a conduit of information about the size of the crowd at the meeting. Together—the questioning of O'Bryan to determine that he was attending the union meeting, coupled with the reliance on that conversation to follow up with O'Bryan to ask about the meeting's attendance—leaves no doubt of the coercive tendency of the questioning. It would feel to a reasonable employee that he was being turned into a source of information on the Union for the Employer. An employee, such as O'Bryan, was in no position to freely refuse to inform. I find that Vogt's questioning of O'Bryan violated the Act.

¶11 of the complaint

Undermining, disparaging, threats by Wiese

Paragraph 11(a) alleges that comments Wiese made in his July 27 meeting with employees violated Section 8(a)(1) of the Act.

In *Turtle Bay Resorts*, 353 NLRB 1242, 1278–1279 (2009), affirmed and adopted, 355 NLRB 706 (2010), the Board adopted the administrative law judge's reasoning that:

It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, '[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).' *Sears, Roebuck & Co.*, 305 NLRB 193 (1991)." *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). Flip and intemperate remarks that are mere expressions of personal opinion are protected by the free speech provisions of Section 8(c). *Id.* "Employer statements must be viewed in context and not in isolation to determine if they have the reasonable tendency proscribed by

²³I found completely disingenuous Vogt's contention that he told O'Bryan that "he . . . [and] all the employees need to go to the meeting . . . it's part of his responsibility as an employee that he needs to be part of it and he needs to make things happen." Vogt further testified, that he said,

You should go to the meeting. It's what you need to do. I made that comment to numerous employees. You know, it's their union. You know, you have to decide what you want to do and go. Voice your opinion."

This effort to transform his search for information on the Union into a purported effort to encourage civic-minded participation in internal union affairs is, euphemistically speaking, a whopper. If I believed it had happened (and I do not, and O'Bryan reported nothing of the kind), it would constitute an independent violation of the Act for it is surely coercive, and an interference with employees' right not to participate in union activities, for a top management official to direct employees to participate in union affairs.

Section 8(a)(1). *Flying Foods Group, Inc.*, 345 NLRB 101, 107 (2005). In addition, "the standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker. *Id.*

Although Wiese's July 27 speech to employees may fairly be characterized as an anti-union rant disparaging of the Union's bargaining conduct, it is not, by virtue of being so, conduct that has a reasonable tendency to "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.

Complaint paragraph 11(a)(i) alleges that Wiese directed employees not to support the Union. Although the gist of his speech is unmistakably hostile to the Union, he does not direct employees not to support the Union. Accordingly, that allegation is dismissed.

Complaint paragraph 11(a)(ii) alleges disparagement and undermining of the Union by, in particular, saying that the union was refusing to bargain or agree to benefits advantageous to employees, and that the Union wanted these benefits rescinded. I agree with the General Counsel that Wiese's statements were crudely misleading. As discussed below this conduct by the Respondent is relevant to (and probative of) the unlawful bargaining allegations against it. But that does not transform them into a coercive threat to the employees.

Complaint paragraph 11(a)(iii) alleges that Wiese's comments unlawfully implied that bargaining with the Union would be futile by telling employees that the Respondent would implement its proposals without the Union's agreement. Again, while Wiese unfairly blamed the Union for the failure to negotiate, it does not seem to me that the Employer is telling employees—explicitly or implicitly—that bargaining is futile. Rather, he is accusing the Union (falsely) of failing to bargain in the interests of the employees.

I do agree that the sum of the Respondent's conduct from November 29, 2011, to the last bargaining session September 20, 2012, evinced contempt for the Union and for the statutory bargaining obligation owed by the Respondent. And I agree that Wiese's speech on July 27 provides evidence of this contempt and is probative of the analysis of the Respondent's violations of its bargaining obligation. But that 8(a)(5) violation is a different thing than these particular allegations of independent Section 8(a)(1) violations.²⁴

Paragraph 11(b) of the complaint alleges that by Wiese, the Respondent violated Section 8(a)(1) of the Act "about" August 27, 2012, when, during the bargaining meeting, Wiese told employees they could not wear or display T-shirts or other articles of clothing supporting the Union. The evidence for this allegation involves Wiese's explanation to the Union bargainers during bargaining on August 28, of the no-solicitation work rule that he intended to implement

²⁴I note that neither of the two cases cited by the General Counsel in support of these allegations in paragraph 11(a) are cases which find independent violations of 8(a)(1) for conduct unrelated to adverse action or threat thereof against employees. See, GC Br. at 52-53, citing *General Athletic Prods. Co.*, 227 NLRB 1565 (1977) and *Pay N Save Corp.*, 210 NLRB 311 (1974). By way of contrast, some of Wiese's comments to employees in March 2012 seem to me to be clearly unlawful. For example, Wiese wrote: "good employees get increases—bad employees get unions." This is a coercive threat by any standard. However, it is not alleged to be a violation.

immediately. Wiese explained that the rule barred union items. Porter asked if, under the policy, he could go on the shop floor with an IAM shirt and Wiese said no, and took the position that "it was his house, he had the right to dictate." The policy, which, as discussed below, the Respondent concedes to be unlawful on its face, bars, in part, "personal items, or any non-AMT literature, notices, posters, buttons, signs, displays, or any other items without the signed dated authorization of the Company consistent with Company policies. For clarity, this would not include school, college, pro team or similar wear in good taste."

It is well established that employees have a protected right under Section 7 of the Act to wear union insignia while working. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). Absent special circumstances and proof not at issue here, it is a straightforward violation of Section 8(a)(1) to tell employees that they cannot exercise their Section 7 right to wear union logos or insignias to work. Wiese's announcement to the bargaining committee, which included AMT employees, that the work rule the Respondent was implementing barred such clothing amounts to just that type of unlawful directive.

The Respondent defends by asserting (R. Br. at 112) that Wiese's comments were only directed to the union representatives Stivers and Porter and not to employees. I reject that. As I have found, Wiese directly explained the policy that was being implemented to the entire committee and told the committee, that its prohibitions would apply to union apparel such as button or hats. Moreover, I reject the contention that because Wiese clarified the prohibitions in response to Porter asking whether the rule would prohibit him from wearing the IAM shirt, that Wiese's affirmative answer applied only to Porter and not to the employees on the bargaining committee. Not only were Wiese's comments intended for the entire bargaining committee but any employee at the bargaining table would reasonably tend to understand Wiese's response to Porter that way. With regard to the entire interchange between the parties on this work rule, there was no equivocation or distinction drawn by Wiese between employees and nonemployees. He made clear that employees could not wear union garb or insignia to work.

It is not necessary in order to find a violation, but adds to the reasonable tendency of the bargaining committee employees to understand Wiese's comments to apply to them to recall that just a few days before, in the previous bargaining session on August 15, Wiese responded to employee Mayfield's question about the no-solicitation proposal—essentially similar to the work rule being implemented on August 28—and told the committee that the proposal prohibited even the display of a union bumper sticker on her car in the parking lot. I find that Wiese's comments at the bargaining table on August 28, violate Section 8(a)(1) of the Act.

¶12 of the complaint
No Solicitation No Posting Work Rule

The Respondent admits that on August 28, 2012, it posted on AMT letterhead the No Solicitation No Posting work rule—the same one discussed with the Union earlier that day.²⁵

The work rule was posted on the glass encased bulletin board in the employee break room. It remained posted and in effect until no earlier than November 27, when Wiese handwrote “Cancelled & Void” across the text.

The General Counsel contends that the rule violates Section 8(a)(1) of the Act. The Respondent acknowledges the violation (R. Br. at 112) and there is no doubt on that score. Such wholesale, sweeping, and overbroad restrictions on concerted activity are unlawful. *Republic Aviation Corp.*, 324 U.S. at 801–803; see, *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (overbroad rule unlawful).

8(a)(5) allegations

¶14 of the complaint
Bypassing the Union

Paragraph 14 of the complaint alleges that the Respondent unlawfully bypassed and dealt directly with unit employees by requesting unit employee volunteers for a weekend overtime shift and, at the same time, seeking suggestions from unit employees to alleviate overtime issues.

The basis for this allegation is the June 20, 2012 memo AMT posted soliciting volunteers to form the temporary weekend crew. The memo stated, in part, “If anyone has additional

²⁵For convenience the text of the work rule is reproduced here:

No Solicitation No Posting Work Rule

There shall be no solicitation by any person of any non-AMT business to employees at any time on company premises inside or outside the building, parking lot, etc. There shall be no distribution of any non-AMT information or any adverse information on AMT or of any nature in working areas, on company premises, or during working time/paid time.

There shall be no postings of personal items, or any non-AMT literature, notices, posters, buttons, signs, displays, or any other items without the signed dated authorization of the Company consistent with Company policies. For clarity, this would not include school, college, pro team or similar wear in good taste. Inappropriate wear which may be considered vulgar, offensive or which is not conducive to a team work environment, that may be considered by the Company in violation of the "No Harassment Policy" implemented December 5, 2011, would not be permitted.

suggestions to alleviate the excessive overtime on these jobs please make sure to talk to Hart Vogt or Mark Alexander.”

In considering this allegation it is important to heed the context in which the Respondent requested employees to provide “additional suggestions” beyond the new weekend shift for which it sought volunteers. That context is (1) that the Employer and Union were at that very time charged with negotiating a collective-bargaining agreement; (2) it is one more example of the Respondent operating as if the Union did not exist, as was evident in the array of unilaterally implemented changes in terms and conditions of employment (see below); and (3) it is one more example of the Respondent’s propensity to hold itself out to employees as the source of any positive changes, with the Union’s role in the process eliminated.

Under the circumstances, the solicitation of suggestions to solve a problem related a mandatory subject of bargaining like overtime hours is in derogation of the Union’s statutory role and unlawful. This is true even if the Respondent were to claim (which it does not) that it planned to take any employee suggestions to the Union for consideration in bargaining. *Harris-Teeter Supermarkets*, 310 NLRB 216 (1993) (during initial bargaining, seeking employee sentiment on unilaterally changed work schedule before presenting it to the union was unlawful direct dealing); *Alexander Linn Hospital Ass’n*, 288 NLRB 103, 106 (1988) (survey of medical, dental or pension preferences before negotiations unlawful), *enfd.* 866 F2d 632 (3d Cir. 1989).

I do not reach the issue of whether, standing alone, the solicitation for volunteers for the weekend crew would constitute direct dealing. It does contain an element of assaying employee opinion about the newly announced crew (which was unilaterally proposed by the Employer without notice or consultation with the Union). However, it is obviously a less direct request for employee input on the crafting of terms and conditions of employment.

I note Respondent’s contention (R. Br. at 88) that the solicitation for suggestions to alleviate excessive overtime could have resulted in operational suggestions for change and not changes in employment conditions, and therefore was not “inherently a request to make suggestions for changes in terms and conditions of employment.” Assuming, *arguendo*, that the suggested changes in operations would not be bargainable, I note again the context: the request was for “additional suggestions”—in addition to the mandatory subject of the formation of a weekend crew that had been unilaterally suggested by the Employer. A reasonable employee would likely understand that suggestions relating to changes in employment conditions were the type of suggestions being sought by the Employer. The possibility that an employee would make a nonbargainable operational suggestion does not obviate the violation.

¶15 of the complaint unilateral implementation

The General Counsel alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing nine different changes in terms and conditions of employment without notifying and/or providing the Union with an adequate opportunity to bargain.

The unilateral changes alleged to be violations are: discontinuing providing free coffee; discontinuing the practice of allowing employees to use ear buds, headphones etc. while working; eliminating the unit position of tool crib operator and transferring that work to a nonbargaining unit position; eliminating the position of gauge calibration technician and transferring that work to a nonbargaining unit position; implementing a new attendance policy; removing the union’s bulletin board from the facility; implementing an AFLAC “voluntary”

insurance benefit; announcing the formation of a temporary weekend crew; and implementing the no-solicitation no-posting work rule.

In *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27 (1987), the Supreme Court held that a recognized union's presumption of majority support is "particularly pertinent" (482 U.S. at 39) in the successorship situation and

continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor.

482 U.S. at 41.

Since at least the seminal case of *NLRB v. Katz*, 369 U.S. 736 (1962), Board precedent has been settled that the general rule is that an employer with an obligation to collectively bargain may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. "[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. at 743. "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

Unilateral changes are a per se breach of the 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *Id.* at 743 ("though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end . . . an employer's unilateral change in conditions of employment under negotiation is [] a violation of § 8(a)(5)"). See also *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) ("The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment").

While negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).

In this case, the Respondent concedes (GC. Exh. NN at ¶2(b); R. Br. 37; Tr. 1187), and does not challenge, that under prevailing Board precedent, it is a successor employer, and "legally obligated at the time it began operations to recognize and bargain with the Union upon the request of the Union."

In addition, the parties have stipulated (Tr. 1187), and the record supports, that this was the “ordinary” successorship situation, where the employer is “free to set initial terms on which it will hire the employees of a predecessor.” *NLRB v. Burns Int’l Security Services*, 406 U.S. 272, 294 (1972).²⁶

Each of the unilateral changes challenged by the General Counsel is alleged to have occurred subsequent to the setting of initial terms and conditions and subsequent to the commencement of production by AMT, in some cases many months later, long after a bargaining obligation attached. There is no dispute over the fact that with regard to each of the alleged unlawful unilateral changes (with one exception, discussed below), the Respondent did not provide advance notice to the Union or provide an opportunity to bargain prior to implementation.

The Respondent, anticipating an argument by the General Counsel that is never made, goes to some lengths to argue (R. Br. at 37–41) that the ordinary (“non-perfectly clear”) successor’s right to unilaterally establish initial terms and conditions of employment is not limited to those announced in advance of or at the time employees are offered employment.

Citing the Supreme Court’s decision in *Burns*, supra, among others, the Respondent first argues that previously unannounced additional initial terms of conditions may be unilaterally established even after employees have already accepted employment based upon initial terms and conditions of employment announced when they accepted employment.

I do not see support for this in *Burns*, which clearly found that, although Burns commenced operations July 1, its obligation to bargain “matured” in late June when it selected its workforce (and the workforce selected Burns) based on announced initial terms. The Court found significance, in the employer’s favor, that “there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent.” The implication is that even before commencement of the operations, changes to the initial terms announced by the successor may not be unilaterally instituted in the face of a bargaining obligation. *Burns* makes clear that even before the commencement of operation on July 1, “[i]f the union had made a request to bargain after Burns had completed its hiring,” Burns would have been obligated to “negotiate[] in good faith and [] made offers to the union” before being free to adopt “such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice.” *Id.* At 295. Indeed, it is hard to see how a rule that permitted unilateral action even after a bargaining obligation had attached could be consistent with the most fundamental scheme of the Act.

²⁶This is in contrast to the less ordinary situation where “it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees’ bargaining representative before he fixes terms.” *Burns*, supra at 294–295. In *Spruce-Up Corp.*, 209 NLRB 194, 195 (1974), enf’d. 529 F.2d 516 (4th Cir. 1975), the Board explained that a “perfectly clear” successor situation should be reserved for situations where “the new employer has either actively or, by tacit inference, misled employees into believing that they would be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”

Although there was some discussion of this at trial that led the Respondent to pursue this argument, the General Counsel does not challenge the Respondent's right to unilaterally establish the initial terms and conditions of employment as of the commencement of operations on December 5, 2011, and hence, I need not rule on the issue.²⁷

But having made the argument that it could establish unilaterally establish initial terms after the workforce was hired, the Respondent stretches the argument (R. Br. at 40–41) to the untenable claim that “a new employer must have some reasonable leeway to effectuate its initial terms before a bargaining obligation arises with respect to a particular ‘new term’” and suggests that “the law is not entirely clear” about how long an employer has to continue unilaterally implementing “initial terms.”

I disagree completely. The Respondent's position quickly leads to the suggestion that implementation of terms and condition of employment after the attachment a bargaining obligation may be insulated from the duty to bargain by characterizing them as the completion of its—pre-bargaining obligation—right to establish “initial” terms and conditions. This view is inconsistent with *Burns*, and Board precedent,²⁸ and the entire thrust of the Act.

The Respondent's argument turns on a dubious distinction it seeks to draw between post-commencement establishment of *initial* terms and conditions on the one hand, and post-commencement *changes* to terms and conditions on the other. The Respondent argues that there is a duty to bargain over the latter but not the former. But this distinction—turbid in its own right—misses the point. The issue is not whether an implemented term and condition of employment may be characterized as a “change” to existing terms and conditions or as simply a new “establishment” of an initial term and condition. Rather, the issue is whether a bargaining obligation exists at the time of the implementation. A successor employer is ordinarily free to

²⁷The General Counsel's forbearance, in this regard may be motivated by the fact that the Union did not request bargaining or recognition until December 8, three days after AMT commenced operations.

²⁸See e.g., *The Bronx Health Plan*, 326 NLRB 810, 813 (1998) (unlawful unilateral change to announce leave policy six days after successor's commencement of operations and attachment of bargaining obligation), *enfd.* 203 F.3d 51 (D.C. Cir. 1999); *Specialty Envelope Co.*, 321 NLRB 828, 832 (1996) (successor violated the Act by unilaterally implementing a disciplinary policy for attendance one month after commencement of operations, where successor was entitled to set its own initial terms “[b]ecause this new policy was announced after [the successor's] duty to bargain had taken effect”); *Banknote Corp.*, 315 NLRB 1041, 1041 (1994) (employer which commenced operations on April 19, 1990 was a “successor . . . within the meaning of *Burns*, and therefore was free to set initial terms and conditions of employment prior to its April 19, 1990 hiring of [the predecessor's] former employees. On that date, however, a bargaining obligation had attached with respect to any subsequent changes the Respondent wished to make in terms and conditions of employment. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment on about April 23, 1990”), *enfd.* 84 F.3d 637, 646 (2d Cir. 1994); *Ranch-Way, Inc.* 203 NLRB 911, 913 (1973) (at time successor hired employees it discussed only wage rates with them; “2 weeks after Respondent had completed the hiring of its workforce, and its obligation to bargain with the Union had accrued, Respondent called a meeting of employees and informed them for the first time the seniority, vacation, and health benefits it would extend. . . . We find that, by instituting these fringe benefits for employees without bargaining with the Union, Respondent violated Section 8(a)(5)”).

unilaterally set initial terms and conditions *only* because there is no bargaining obligation. When there is (i.e., when it is a “perfectly clear” situation), then the successor cannot even set initial terms and conditions unilaterally. It is the existence or nonexistence of the bargaining obligation that determines whether an employer can unilaterally implement—whether initially or changing existing terms and conditions.

The point of *Burns* and the “perfectly clear” exception is that in the ordinary successorship situation the existence of a bargaining obligation may not be determined until the successor’s workforce is hired, which occurs when the workforce accepts the terms and conditions offered by the employer. Once the ordinary successor’s workforce has been hired, if the workforce composition triggers a bargaining obligation, the time for unilateral action is over.

That is the essence of the statutory obligation to bargain. It is not that an employer cannot change terms and conditions at this point, but it must do so in consultation with the employees’ union. Acceptance of the Respondent’s demand for “leeway” to continue to act unilaterally after attachment of its bargaining obligation would sanction an evisceration of the statutory duty to bargain. There is no grace period for unilateral action in the face of a statutory duty to bargain.²⁹

I will consider each alleged unilateral change in turn.

(a) Change in coffee pricing

As referenced above, under MKM coffee was provided for free and was available throughout the production facility. While AMT did not replenish the stock of coffee in the weeks after it commenced operations, during the initial weeks of AMT’s operations employees continued to enjoy free coffee and to drink it throughout the work areas, as they did under MKM. AMT made no move to charge for coffee, or restrict its consumption on the shop floor until at least January 5, 2012, when it issued a memorandum banning drinks and food in work areas and moving to remove coffee pots and paraphernalia from the shop floor. Some time that month, AMT placed coffee vending machines in the newly renovated break room where coffee was available to employees for the inexpensive (but not free) price of 10 cents a cup.

The primary point is that the solution to the problem posed by open and available beverages—and certainly the price and method of dispensing coffee—is a subject eminently suitable for collective bargaining. As the Supreme Court explained in *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 498 (1979):

It reasonably follows that the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to

²⁹There may, of course, be cases, where a successor employer has determined to implement initial terms and conditions before attachment of a bargaining obligation but there is a delay in implementation or announcement. In such cases, issues may arise as to the pre-bargaining obligation certainty, specificity, or communication of the anticipated implementation. No such difficult calls are presented in this case. However, I note that the Board’s existing rules regarding unilateral implementation of a change decided upon before a bargaining obligation arose would provide an appropriate method of analyzing the issue. See, *Mail Contractors of America, Inc.*, 346 NLRB 164, 175 (2005) (“If an employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by its later implementation of that change”); *SGS Control Services*, 334 NLRB 858 (2001).

workers, and one need not strain to consider them to be among those “conditions” of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain”).³⁰

See also, *Beverly Enterprises*, 310 NLRB 222, 239 (1993) (unilateral change from daily free coffee to vending machines is violation), *enfd.* In relevant part, 17 F.3d 580 (2d Cir. 1994); *Central Mack Sales*, 273 NLRB 1268, 1279 (1984) (unlawful unilateral change to move from free coffee in pots in office to vending machine dispensed coffee for 25 cents).

I reject the Respondent’s contention that Vogt’s statements to employees on November 29, 2011, that everything would change constitutes a defense to every—or any—subsequent specific changes to terms and conditions of employment unilaterally carried out by the Respondent after its bargaining obligation attached. I accept that the genesis of the decision to remove coffee from the shop floor, and, I presume to put the coffee in vending machines in the break room and charge for it, was, the identification of the hazards presented by open beverages raised by the industrial hygienist on November 29. But there is no credible evidence that the solution to that problem—and certainly not the pricing of coffee—was determined before the duty to bargain attached.³¹

³⁰In *Ford Motor Co.*, *supra* at 498–499, the Supreme Court rejected the numerous appellate court decisions that had refused to enforce the Board’s consistent view that the Act required bargaining over in-plant food and beverage prices and availability. The Court explained:

Including within § 8 (d) the prices of in-plant-supplied food and beverages would also serve the ends of the National Labor Relations Act. “The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.” *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). As illustrated by the facts of this case, substantial disputes can arise over the pricing of in-plant-supplied food and beverages. National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining. The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process until strikes or other forms of economic warfare occur.

³¹Of course, to the extent the change in policy was prompted by safety and health concerns, those are mandatory subjects of bargaining. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995) (“Health and safety matters regarding the unit employees’ workplaces are of vital interest to the employees and are, thus, generally relevant and necessary for the union to carry out its bargaining obligations Few matters can be of greater legitimate concern”); *American National Can*, 293 NLRB 901, 904 (health and safety are mandatory subjects of bargaining), *enfd.* 924 F.2d 518 (4th Cir. 1991).

A variation but also unconvincing twist on this theme is the Respondent's contention that there was no "past practice" of providing coffee established. But this contention is misplaced. The provision of free coffee was not an episodic occasional event, requiring analysis of whether it amounted to a term and condition of employment. MKM *and then* AMT continuously operated with coffee available for free every day all day until the policy was unilaterally changed in January 2012. That AMT did not buy it, is beside the point. It operates and controls the facility and it kept the coffee available. Loss of such a daily benefit, even one that existed for only a month at AMT, is a bargainable change in existing terms and conditions of employment. There is no grace period after the duty to bargain attaches during which an employer may continue to unilaterally make changes in terms and conditions of employment.

Finally, I do not accept the Respondent's contention that the matter is too "insignificant" to require bargaining, as the price change was so small. Two points compel the result. First, "[t]he Board has consistently held that in-plant food prices are among those terms and conditions of employment defined in § 8(d) and about which the employer and union must bargain under §§ 8(a)(5) and 8(b)(3)." *Ford Motor Co.*, supra at 494–495. Today it might be 10 cents but tomorrow it could be a dollar. But

[t]he small amount of the increases in the price of coffee and hot dishes is not the measure of the importance of the issue. In determining whether a matter is a mandatory subject of bargaining, whether much or little is involved financially is not the controlling test. . . . The underlying philosophy of the Labor Act is that discussion of issues between labor and management serves as a valuable prophylactic by removing grievances, real or fancied, and tends to improve and stabilize labor relations. Experience teaches that major work interruptions may spring from seemingly trivial causes."

Westinghouse Electric Corp. v. NLRB, 369 F.2d 891 (4th Cir. 1966) (rejecting contention that a penny a cup increase in the price of coffee was too insignificant to require bargaining), rev'd en banc, 387 F.2d 542 (1967), but endorsed by the Supreme Court in *Ford Motor*, supra, at 502.

Second, the price change alleged to be unlawfully imposed here is linked, factually and causally to the more general change in policy that moved coffee and food off the shop floor and into the break rooms, with coffee dispensed by vending machines. All of that is bargainable and in considering the significance and materiality of the price change, one part cannot reasonably be abstracted from the whole and declared insignificant. While only the unilateral price change is alleged unlawful, and I will find a violation and order a remedy only as to the price change, the scope of the overall unilateral change, of which the price change is but one inextricable part, defeats any claim of immateriality.

(b) Prohibition on ear buds

As discussed above, under MKM, employees were permitted to wear headphones, ear buds and the like while they worked to listen to music through personal music players. The January 5, 2012 memo banning food and beverage in the work areas also announced that due to "safety concern, we must keep radios off the shop floor. No iPods, MP3 players, earphones or headphones will be allowed on the manufacturing floor. We must all be able to hear and be aware of all hazardous noises and warnings."

While this was the first general announcement, unlike the food and beverage announcement, the record evidence demonstrates that this rule regarding ear buds had been in

place and maintained as an “unwritten” rule since the commencement of production on December 5, 2011. Employee Renn credibly testified that on or about December 5, 2011, i.e., that from “day one,” he was told by his supervisor that ear phones were no longer allowed during work. Elliott and Alexander testified similarly, and Alexander testified that as of
 5 December 5, he would approach any employee he saw wearing ear buds or the like and “tell them it’s not allowed.” While it may be true that the rule was unwritten and not formally or generally announced until January 5, 2012, this does not mean that the rule was not in place and not enforced as of December 5. I find that the rule was implemented December 5. The
 10 Union’s request for bargaining was first made December 8. As I read the Board’s precedent, a duty to bargain in the successorship context does not arise until the Union makes a bargaining demand.³²

I will dismiss this allegation of the complaint alleging an unlawful unilateral change with regard to implementation of the ban on wearing ear buds and the like while working.

³²Why this is so, is not evident. In *Fall River Dyeing*, the Court approved the Board’s “continuing demand” rule, including the requirement when applying the substantial and representative complement rule that “[t]he successor’s duty to bargain at the ‘substantial and representative complement’ date is triggered only when the union has made a bargaining demand.” 482 U.S. at 53. From *Fall River*, one might conclude that application of the substantial and representative complement rule should be limited to circumstances akin to the extended start up situation described in *Fall River Dyeing*. Based on *Burns*, it makes sense that when a successor immediately begins normal production, as in *Burns*, the composition of the employer’s workforce and the existence of a bargaining obligation can be measured from day one. *Vermont Foundry* 292 NLRB 1003, 1009 (1989). In those circumstances, there is no reason to require the formality of a bargaining demand before the bargaining obligation attaches. See, *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 646 (2d Cir. 1996) (enforcing, 315 NLRB 1041 (1994)), cert. denied, 519 U.S. 1109 (1997). The General Counsel in *Banknote* contended successfully to the Court of Appeals that the uninterrupted operations and immediate hiring of the predecessor employees meant that no bargaining demand was necessary in order to find a bargaining obligation. The Court held (84 F.3d at 646):

[w]hile the two-pronged rule of *Fall River Dyeing* may be appropriate in a situation involving the staggered or gradual hiring of employees during a startup period, or even the hiring of employees after a prolonged delay between the closing and reopening of a business . . . the absence of a bargaining demand in this case—which involves neither a prolonged startup and gradual or staggered hiring of employees nor a significant hiatus in operations, but rather, a rapid transition period with the immediate hiring of a full employee complement—does not preclude a finding of a duty to bargain.”

Notwithstanding this, the fact is that without distinguishing the extended start-up situation in *Fall River Dyeing* from a more seamless transfer of operations such as in *Burns*, many Board cases since *Fall River Dyeing* have tended to apply the substantial and representative complement formula for successorship cases generally, with the requirement that a bargaining demand is necessary to trigger the duty to bargain. See, e.g., *Hampton Lumber Mills—Washington, Inc.*, 334 NLRB 195 (2001), enfd. 38 Fed. Appx. 27 (D.C. Cir. 2002); *MSK Corp.*, 341 NLRB 43, 44 (2004); *The Market Place, Inc.*, 304 NLRB 995, 1000 (1991); *Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039, 1040 (1989). I defer to these (and all other) examples of Board precedent and find that AMT’s bargaining obligation did not attach until December 8, 2011, the date of the Union’s bargaining demand.

(c) & (d) Eliminating the tool crib operator and gauge calibration technician and transferring the work to a non unit positions

The complaint alleges that the Respondent eliminated the unit positions of tool crib operator and gauge calibration technician and transferred the work of those positions to nonunit positions, in violation of Section 8(a)(5) of the Act.

It is undisputed that under MKM, gauge calibration work was bargaining unit work, performed by a bargaining unit employee. It is also clear from the record, and I find, that gauge calibration is an essential work function for an employer in the employing industry engaged in by MKM and AMT. Similarly, under MKM, a unit employee maintained the tool crib and stored tools that were distributed to operators from the tool crib. It is undisputed that the tool crib work was bargaining unit work performed (at least during the day shift) by a bargaining unit employee. It is also clear from the record, and I find, that maintaining the tools and the tool crib remain part of the AMT operations. In other words, without regard to whether it is done by a unit employee, by a salaried employee, or contracted out, the gauge calibration and tool crib work had to be done. The work could be delayed, as it was by AMT, but in time it had to be done. AMT has not removed or avoided these functions as part of the operation. In other words, there has been no fundamental redirection of the enterprise under AMT that has led to the lack of need for this work to be performed—by someone—as part of the operation.

These premises dictate the conclusion as to these allegations of the complaint. AMT is, admittedly, a successor to MKM. This means that there is a substantial continuity between the employing enterprises. *Fall River*, 482 U.S. at 43. This means that as a successor, AMT assumed the historic bargaining unit. The very point of the Board's successorship rules is that "a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstances' as to affect the force of the Board's certification within the normal operative period" (*Burns*, supra at 279), a precept extended in *Fall River*, supra, to bargaining units that have been long recognized but not recently certified. That is why it has been a "longstanding policy" of the Board "that a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales and Service, Inc.*, 288 NLRB 1123, fn. 5 (1988). There is no evidence, and no claim, that AMT has reorganized the unit or operation to such an extent that the historic bargaining unit is no longer appropriate.³³

³³See *Phoenix Pipe and Tube Co.*, 302 NLRB 122, 122 (1991), enf'd. 955 F.2d 852 (3d. Cir. 1991):

notwithstanding the Respondent's transformation of numerous craft and noncraft classifications into four basic pay groups the evidence showed that at the relevant time . . . when the Respondent commenced operations with a representative complement of employees and when a union demand for recognition was pending --- most employees continued to spend most of their day performing the same tasks and using the same skills they had used in their work for the predecessor. As the Respondent's chief operating official acknowledged, it was in the Respondent's "best interests," at least at the outset, "to put the best operator doing what he knows best right now." When employees continue doing substantially the same work that they did for a predecessor, we will not find that the addition of some new job duties is likely to change their attitude towards their job to such an extent as to defeat a finding of continuity of the enterprise.

As the Board explained in *SFX Target Center Arena Management*, 342 NLRB 725, 734 (2004):

"Units with extensive bargaining history remain intact unless repugnant to Board policy or interfere with rights guaranteed by the Act." (Footnote omitted.) *P. J. Dick Contracting*, 290 NLRB 150, 151 (1988). After all, bargaining history is "evidence of natural groupings of employees," *International Association of Tool Craftsmen v. Leedom*, 276 F.2d 514, 516 (D.C. Cir. 1960), cert. denied 364 U.S. 815 [1960], and perpetuation of such historical "natural groupings" advances the policy of industrial stability and industrial peace.

That conclusion is no less applicable whenever one employer succeeds another as the employer of employees who have been represented in a historical bargaining unit. That is, "mere change in [employer] should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales*, 288 NLRB 1123, fn. 5 (1988). Accord: *Trident Seafoods, Inc.*, 318 NLRB 738 (1995); *NLRB v. Joe B. Foods, Incorporated*, [953 F.2d , 287] (7th Cir. 1992).

Thus, the Respondent was not free to—and just as importantly, did not—remove the gauge calibration work from the unit as part of the initial terms and conditions of employment. Rather, it simply did not assign any employee to calibrate gauges, an essential function in the facility, but one that Vogt testified he initially wanted to contract out. He did not act on this plan, however, and after “limping along” without a fulltime employee dedicated to gauge calibration (a small number of gauges were calibrated during this time by unit employees), AMT found itself “very far behind”—over 400 gauges behind—in gauge calibration. Around Christmas Vogt came up with the idea of creating a new nonunit position that included but was more than simply gauge calibration, a position that would also involve designing, developing proper methods of measuring parts, with quicker more accurate gauges.³⁴

By Christmas, and certainly by late January 2012, when unit employee Craig Meredith was hired into the newly created nonunit gauge position—thus removing the gauge calibration work from the bargaining unit—the Respondent was under an obligation to notify the Union and bargain about changes to the scope of the bargaining unit. This new position did materially affect the scope of the bargaining unit as it removed from the bargaining unit the work of gauge calibration, henceforth to be performed by Meredith as part of his duties. That work was, accordingly, lost to the bargaining unit, although it had been, indisputably, work historically performed by the bargaining unit. As the authorities cited above make clear, that is a subject that it is unlawful for the employer to unilaterally undertake.³⁵

³⁴I need not consider whether the employer could lawfully have unilaterally moved to contract out all gauge calibration prior to the attachment of a bargaining obligation, as it did not happen.

³⁵The Respondent's contention (R. Br. at 47) that there was no significant impact on the unit is based on a false premise that assumes the conclusion the Respondent would like to see. It assumes, in error, that because AMT delayed taking any action to address its gauge calibration needs when it took over the facility that this work process was never part of the bargaining unit work at AMT. Hence, according to the Respondent, creating a nonunit position that included

Thus the unilateral removal of the work from the bargaining unit was unlawful. The unilateral elimination of the gauge calibration position was also unlawful, given that it occurred long after the time the bargaining obligation attached. Unlike the removal of the work from the unit, the Respondent could have, as part of its initial terms and conditions of employment, restructured the unit classifications and positions so that the unit work—while remaining within the unit—was carried out without the separate position of gauge calibration. But the Respondent did not do that. Rather, it simply ignored the gauge calibration work and did not fill the gauge calibration position. But the work remained an essential part of the unit work, and once the Respondent moved—as it inevitably had to—to have the gauge calibration work performed—its bargaining obligation mandated that any changes in how that work was to be carried out had to be negotiated.

The Respondent approaches the issue of the transfer of this unit work as just one more issue of its right to set initial terms and conditions of employment. It argues, essentially, that as an initial matter, it eliminated this position and the work from the bargaining unit (originally intending to contract it out) and it was free to do so as part of establishing the initial terms and conditions of employment.

The premise is completely wrong. As discussed above, the scope of the bargaining unit is not a term and condition of employment. And a successor with an obligation to bargain is not free to unilaterally reshape the scope of the bargaining unit.

The analysis is the same for the tool crib work. When AMT commenced operations it initially left the tool crib unmanned and left it to employees, through supervisors, to retrieve their own tools. This, however, did not eliminate the tool crib job functions from the bargaining unit, as the work had historically been part of the bargaining unit and the need to maintain, catalogue, store, and retrieve tools was in no way eliminated from the necessary functions of the operation under AMT. AMT could not go long without having the tool crib operator functions performed in some manner. Vogt testified that around Christmas he decided that he wanted to hire a “tool guru” to manage the tooling. The new tool position was created as a nonunit position, filled on January 9, and in doing so all of the tool crib operator functions performed for years by a bargaining unit employee were removed from the bargaining unit as part of the new nonunit position.

However, this unilateral removal of the tool crib operator functions from the bargaining unit, unlawfully transferred historic bargaining unit work out of the bargaining unit. That work, which amounted to a full-time job for one employee was removed from the scope of the bargaining unit by the Respondent's unilateral action. As with the unilateral transfer out of the unit of the gauge calibration work and elimination of the unit position performing that work, the Respondent's unilateral action with regard to the tool crib work violated Section 8(a)(5) of the Act.

gauge calibration had no impact on the bargaining unit. As explained in the text, I disagree. The act of foregoing gauge calibration that was a necessary and ongoing part of the operation did not remove that historically bargaining unit work from the bargaining unit, anymore than skimping on all maintenance for a couple of months would remove all maintenance work from a production and maintenance bargaining unit.

(e) elimination of double time pay for Sunday work

This allegation was deleted from the complaint. See, GC Exh. 1(ss) at ¶¶3.

(f) implementation of attendance policy

There is no dispute that effective March 1, 2012, an attendance policy was implemented by the Respondent. The Union was neither informed in advance nor provided an opportunity to bargain before the policy was implemented. The evidence supports the Respondent's contention that prior to March 1, 2012, AMT had "no attendance policy" by which the evidence shows AMT handled attendance issues on a case by case basis with the risk of arbitrary and inconsistent application of rules and discipline.

Attendance policies are, obviously, mandatory subjects of bargaining, a point that the Respondent acknowledges (R. Br. at 84). The failure to provide the Union advance notice and an opportunity to bargain before implementing is a violation of Section 8(a)(5) of the Act. That is what happened here and the violation is proven.

The Respondent's defense is one that it admits (R. Br. at 84) to be novel: it claims that the Board should find that the Union engaged in "temporary abandonment" of the bargaining process and that this should permit discrete unilateral changes during a period of time—such as February through July 2012, when the parties chose not to schedule bargaining sessions.

The defense is not only novel, but would make bad policy, and here it is objectionable based on both facts and law. It is objectionable as a matter of law because the duty to notify a union about proposed unilateral changes is the employer's—it is not the union's. Here the Respondent could have done that by picking up the phone, sending an email, or wandering out to the plant perimeter to discuss it, where, by all evidence, the Union was actively handbilling and present during the spring of 2012. The Respondent failed in this elementary part of its legal obligation.

The defense is objectionable as a matter of fact because, as the Respondent concedes, there was no "abandonment" by the Union of the bargaining unit as the Board understands that term. The failure of the Union to schedule a bargaining session from mid-February to July provides absolutely no basis for the Respondent to be excused from its statutory obligations. The duty to bargain is a two-way street. Nothing prevented the Employer from seeking to meet with the Union during this time.

Alternatively, the Respondent contends that the Union's "inactivity" and "failure to bring any of these issues to Respondent's attention" constitutes a waiver of the right to bargain. Again, it was the Respondent's—not the Union's—duty to provide advance notice of proposed changes in terms and conditions of employment. And the Union did, in fact, take action when it subsequently learned of the unilateral implementation of the attendance policy: it filed an unfair labor practice charge which quickly came to the "Respondent's attention."

Moreover, the fact that the parties discussed the March unilateral implementation—after the charge was filed—in July—does nothing to ameliorate the violation. It is axiomatic that the violation was complete with the failure of the Respondent to provide advance notification.³⁶

5 Finally, contrary to the Respondent's claim, it does not matter that the Union consented in July to allowing the Respondent to keep the unilaterally implemented policy in place while the parties bargained. This is because the violation—and the damage to the collective-bargaining process—is the unilateral implementation. Indeed, were a union to insist on the after-the-fact rescission of an unlawfully implemented policy that benefits employees, the perniciousness of
10 the violation might be aggravated, not ameliorated, as the employees may view the union as acting to take away benefits that the employer has (in violation and in dereliction of its bargaining obligation) provided to employees.³⁷ Thus, the standard Board remedy for unlawful unilateral implementations that benefit employees includes requiring the employer to rescind the unlawful change *only upon the union's request*. A union's decision to allow the unlawful change
15 to remain in place does not obviate the violation. Similarly, the Employer's asserted willingness to rescind any attendance points assessed against employees from March to July, applying points only once the Union agreed in bargaining not to require rescission, provides no defense. See, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (an effective repudiation of an unfair labor practice must be timely, unambiguous, specific to the coercive conduct, free from
20 other illegal conduct and provide assurances to employees that there will not be future interference with the exercise of their rights). The Respondent's actions meet none of these criterion. Indeed, there is no evidence that employees or the Union were even made aware of the rescission of the March-July assignation of points until Elliott discussed it at the hearing.

25 The Respondent's implementation of the attendance policy violated the Act, as alleged.

(g) removal of the union bulletin board

30 The complaint alleges that about April 2012, the Respondent removed the Union's bulletin board from the facility.

35 The evidence shows that a bargaining unit employee, apparently hostile to continued union representation, tore down the union materials from the union portion of the bulletin board around the first week or so of AMT's operation of the facility in December. Alexander observed this, but did not stop him. He reported it to Elliott, who took no action.

³⁶*Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain"), *enfd.* 722 F.2d 1120 (3d Cir. 1983); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) ("an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals"), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

³⁷Certainly Wiese was conscious of this and devoted much of the July 27 employee meeting to attacking the Union for filing charges over the Respondent's unilateral implementations and accusing the Union (falsely) of wanting to have these benefits taken away. It was a transparent effort to undermine the bargaining process and use the Respondent's violations of law to undermine support for the Union.

Sometime between February and June, the record is unclear, and the testimony inconsistent, the shipping department was moved and the shipping racks, and the bulletin boards on them were thrown out. Henceforth, AMT posted notices behind the glass-encased locked bulletin boards in the break room. There was no place for the Union to post materials in the breakroom (or anywhere else). The record reveals no complaint by the Union at the time or any effort to post anything on the new bulletin boards. The Union raised the issue through the filing of an unfair labor practice charge in July 2012, and asked for the union bulletin board to be reinstated during bargaining on August 28, 2012.

This issue turns on the question of whether the Union ever had a bulletin board under AMT. The Respondent contends (R. Br. at 85) that it never affirmatively instituted a union bulletin board. It contends that the fact that MKM had one that was left intact and in place when AMT commenced operations is irrelevant, that there was never an AMT-approved union bulletin board. Therefore, reasons the Respondent, there was no change when the Respondent threw away the shipping department bulletin boards and moved the bulletin boards—without a union bulletin board—into the break room.

I cannot accept the Respondent's argument. First of all, as discussed above, the fact that AMT never affirmatively announced or set up a new bulletin board is not the test of whether it maintained one. Here, it left the MKM bulletin board up when it commenced operations and thereby made it part of the working conditions at AMT. What is more—and this refutes AMT's argument, even on its own terms—the evidence is that AMT consciously and purposely allowed the union bulletin board and its postings to remain even as they cleared the bulletin boards of MKM-generated materials. Elliott testified that during the first week of AMT's operation she and Vogt were clearing the bulletin boards of MKM material, but left the union materials:

We left all the Union information. He and I each got to that and I said I'm not touching that one and he said I'm not either.

Vogt testified about the same event:

Then to the far left was what was called the Union bulletin board. I didn't touch anything on that.

Thus, Vogt and Elliott, readying the bulletin boards for AMT, purposely chose to maintain the union bulletin board. Nothing more is needed to demonstrate that AMT did, contrary to the Respondent's argument, maintain a union bulletin board as part of its initial terms and conditions of employment. It was not let up as an oversight, or through a failure to get to it in the busy days of the Respondent's initial operation. The decision by AMT was to maintain it.³⁸

³⁸Thus, the facts here are diametrically opposite to those in *S&F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009), on which the Respondent relies. The Board has not accepted the court's reasoning that a few days delay in dismantling the union bulletin board in that case meant that the employer had not adopted the bulletin board as part of the initial terms and conditions of employment. But even with that, the Court's reasoning turned on the fact that the employer moved to *dismantle* the union bulletin board maintained by the predecessor within days of the commencement of operation. Here, Vogt and Elliott did the opposite: they chose to maintain the union bulletin board.

The fact that soon thereafter a bargaining unit employee removed the union materials does not change anything in a material way. No one from the Union made an effort to post additional materials, but, then again, no one from the Union knew what had happened to the bulletin board. Employees probably assumed (wrongly) that management removed it, and they likely believed they should not attempt to post new material. Notably, Elliott (and Alexander) knew what had happened to the Union's postings, but they did not tell the Union either. In any event, it does not change the fact that the bulletin board remained in place, albeit empty. It was left there purposely by Vogt and Elliott, available for use (although I doubt any employees knew that) until the Respondent unilaterally relocated the bulletin boards to the break room and this time, unlike in December, neither Vogt nor Elliott took steps to retain the union bulletin board. This time, they got rid of it.

The Respondent violated the Act as alleged, when it removed the Union's bulletin board from the facility.

(h) implementation of AFLAC policy

The complaint alleges that about May 2012, the Respondent unlawfully implemented an AFLAC insurance benefit, which employees could choose to purchase.

AMT offered employees "voluntary" insurance under AFLAC (cancer care, supplemental accident coverage, critical care and recovery) as an option for the first time in late May, effective, June 1, 2012. Prior to this time, AMT did not offer this benefit to employees. There was no advance notification to the Union of the implementation of this benefit at this time.

The unilateral implementation is a straightforward violation of the Act, as alleged.

The Respondent defends this allegation claiming (R. Br. at 87) that "Respondent clearly established that AFLAC policies were part of the lawfully established initial terms and conditions of employment." I reject this defense. In fact, neither the attachments to the November 29, 2011 packet provided to employees nor the December 4, 2011 initial terms and conditions of employment mention AFLAC. The December 4, 2011, initial terms and conditions mention only short and long term disability, and additional term life insurance, items that are different from the challenged implementation of the AFLAC benefits. In any event, at the commencement of AMT operations, the AFLAC benefit was, at most, an intention of AMT, but according to Wiese, "AMT had no arrangement with AFLAC to cover AMT employees at this time." It still needed to be negotiated, and bid, and determined by AMT if and when it would be implemented. That is not an initial term and condition of employment. To find that it was would denigrate the statutory obligation to bargain changes in terms and conditions and allow an employer to insulate vast areas of mandatory subjects from the bargaining obligation simply issuing broad statements of issues they hoped to address in the coming months (or years).

As noted above, the Board has perfectly reasonable rules permitting an employer that—before a bargaining obligation attached—has already determined to implement a benefit, to do so notwithstanding the emergence of an intervening bargaining obligation. See, *Mail Contractors of America, Inc.*, 346 NLRB 164, 175 (2005) ("If an employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by its later implementation of that change"); *SGS Control Services*, 334 NLRB 858 (2001).

These rules seem appropriate guideposts for when a successor employer can implement terms and conditions decided upon and at the time of commencement but which, for some legitimate reason, could not be immediately implemented.

Here, the Respondent's desire to implement AFLAC at some later date—if the bidding process worked, and if AFLAC responded positively to its review of employee population data—bears none of the certainty or pre-determination that would allow it to be considered a benefit regarding which implementation was already decided as of December 5, 2011. The philosophy and point of the Act is that much good can come from the bargaining process. An employer can institute initial terms and conditions of employment. It cannot evade the collective bargaining process 5 or 6 months later by unilaterally implementing a benefit that it only hoped to offer at the time it established the initial terms and conditions of employment and commenced normal operations.³⁹

(i) Announcement of formation of the weekend crew

The complaint alleges that the notice issued by the Respondent announcing the formation of a weekend crew constituted a violation of Section 8(a)(5). This is separately alleged from the allegation (discussed above) that the notice regarding the weekend crew constituted unlawful bypassing and direct dealing. This issuance of the notice is among a list of nine extant actions that the General Counsel alleges to be unlawful unilateral implementations by the Respondent. (Complaint paragraph 14(i).) In its brief, the General Counsel offers no argument for why a notice of a new crew—that was not implemented—constituted a unilateral implementation. Having ruled on the direct dealing/bypassing allegation, I discern no other independent 8(a)(5) violation here. I will dismiss this allegation of the complaint.

(j) implementation of No Solicitation No Posting work rule

The complaint alleges that the implementation of the No Solicitation No Posting Work Rule violated Section 8(a)(5) of the Act.⁴⁰

Unlike the other alleged unlawful unilateral changes, this one was proposed by the Respondent and discussed in bargaining before it was implemented on August 28 by the Respondent. In the face of the Union's objections to the policy, Wiese told the Union that it would be implemented immediately.

The Respondent asserts that the parties discussion amounted to an impasse on the subject of the no-solicitation policy and that the Respondent was therefore free to implement it. In the first place, and dispositively, it is a violation of the Act to insist to impasse on an unlawful proposal. *Massillon Community Hospital*, 282 NLRB 675, 676 (1987) ("it violates the Act for a

³⁹The Respondent also argues (R. Br. at 87), as it did with regard to the unilaterally implemented attendance policy, that any violation with regard to implementation of AFLAC is voided by the Respondent's subsequent willingness to bargain over it, and the Union's subsequent willingness to allow it to remain in place while the parties bargained. For the same reasons set forth above with regard to the attendance policy, this defense is meritless.

⁴⁰As it was unlawful on its face, its implementation also independently violated Section 8(a)(1), as discussed above.

party to create a bargaining impasse by insisting on an unlawful condition of employment or a term which contravenes the fundamental principles of the Act"); *Amalgamated Meat Cutters (A&P)*, 81 NLRB 1052, 1061 (1949). At the same time, the finding of a valid impasse is premised on lawful and good-faith bargaining conduct. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). Under the circumstances, the Respondent's impasse argument does not advance its position.

Second, while the parties discussion of this harsh and facially unlawful proposal manifestly does not meet the factual standards for impasse, just as important, while negotiations for a collective-bargaining agreement are ongoing "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), *enfd. mem.* 15 F.3d 1087 (9th Cir. 1994).

Wiese's characterization of this work rule proposal (and 15 other proposals) as "non-contractual" items that needed to be implemented "now before the contract" does not privilege the Respondent's unilateral implementation. This is, indisputably, a mandatory subject of bargaining, and there was no overall impasse in collective bargaining, and none asserted. Similarly, the Respondent does not assert, and could not seriously assert, that the Respondent's need to implement this (unlawful) proposal, met the Board's standard for permitting piecemeal unilateral implementation during collective bargaining for "certain compelling economic considerations." *RBE Electronics*, 320 NLRB 80, 81 (1995).⁴¹

Accordingly, the Respondent's unilateral implementation of its no-solicitation work rule constituted an unlawful unilateral implementation in violation of the Act.

¶¶16 and 17 of the complaint Requests for Information

The complaint alleges that the Respondent unlawfully failed and refused to provide the Union with the following requested information: (1) the names of employees who volunteered for the weekend overtime crew; and, (2) the rates, schedules of benefits, deductibles and max out-of-pocket comparison document for the health insurance comparison from the old MKM policies to the current Respondent's employees.

"An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A-1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). As explained in *A-1 Door & Building Solutions*, *supra*:

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and

⁴¹"The Board has limited its definition of these considerations to 'extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *RBE Electronics*, *supra* at 81.

other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

- 5 See also, *Disneyland Park*, 350 NLRB 1256, 1257 (2007) ("Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the Respondent must provide the information").

10 Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

15 In this case, the Union requested the names of bargaining unit employees who volunteered for the weekend shifts by letter on July 30, and again at the bargaining table on August 1. The Respondent acknowledges that it refused to provide the Union the information. It stated that it would only provide the names if the volunteers individually consented. This information is presumptively relevant, as it concerns bargaining unit employees represented by the Union. Because the request was presumptively relevant, the Union was not required to explain its rationale for wanting the information. However, were it necessary to establish
20 relevance, Cutler's explanation at the bargaining table provided more than sufficient rationale for the Union's desire for the information. Cutler explained "we may need to talk to them to see what their needs and concerns are regarding making a contract proposal on the weekend shift."

25 The Employer had no right to keep the information from the Union, or to provide it only if individual employees consent. The Union represents all the unit employees, not just the ones who are willing to announce to the employer that they are willing to cooperate with the Union. The Respondent's explanation in correspondence and at the bargaining table that it was not "appropriate" to provide the information because the Respondent did not accept that the Union represented a majority of the employees, is a particularly meritless, and a telling explanation
30 demonstrating obstructive motives for the Employer's refusal to provide the information.

On brief, the Respondent's defense to this allegation is make-weight. It is no defense that the weekend crew was never implemented. The Union had a right to ask these employees their interests, ideas, and concerns about overtime. The Respondent's contention that the
35 Union could just ask all the employees to come talk if they were the ones who volunteered is unavailing. I recognize that even if the Union had the names of the employees, the employees might be unwilling to talk to the Union. But the Union has a legitimate interest in making a personal appeal to the employees in question—employees whom they represent—and not being relegated to general solicitations asking anonymous employees to come forward. The
40 names will be "of use" to the union in representing the bargaining unit, and that is the extent of the relevance required (were the presumption of relevance rebutted, which it was not). *W-L Molding Co.*, 272 NLRB 1239, 1240 (1984).

45 The Respondent's invocation of the employees' "confidentiality" interest is also baseless. While the Board is careful to balance legitimate and substantial confidentiality interests impacted by an information request, this is a circumscribed concept.⁴² There is no confidentiality interest in the identity of unit employees who volunteered for overtime assignments. The employees' alleged "disenchantment" with the Union, or the fact that they

⁴²See discussion in *Alcan Rolled Products*, 358 NLRB No. 11, slip op. 6–7 (2012).

were unwilling to tell the Employer to provide their names to the Union, does not a legitimate confidentiality interest make. The Employer cannot rely on individual employee preferences as a screen for interfering with the collective bargaining process.⁴³

5 The Respondent's failure to provide the Union the requested names of all volunteers for the weekend shift crew is a violation of the Act, as alleged.

10 With regard to the Union's health insurance information request, I find no evidence that the Employer ever provided the Union with the schedule of benefits, deductibles, or max out of pocket information as requested. I find no evidence that it provided the rates that changed in June 2012. (The Employer's September 20 proposal included rates but a drafting note indicated that the "actual current rates" would be supplied, which indicates that the rates in the September 20 proposal were inaccurate.). With regard to the MKM information, the Respondent asserted that it did not possess that information. Wiese's fall 2011 work with MKM health care claims provides some basis to believe (as the General Counsel argues) that AMT had access to MKM health care information. But it is insufficient to rebut Wiese's claims that he did not have the requested information when requested. However, the Respondent has failed to demonstrate that it made a good-faith attempt to obtain the MKM information. AMT was required, at least, to prove that it sought the information in good faith. *Pittston Coal Group, Inc.*, 334 NLRB 690, 692-693 (2001) ("employers who did not possess information requested by unions violated Section 8(a)(5) by failing to show that they attempted to obtain the information from those who did have it and were refused"); *National Extrusion, Inc.*, 357 NLRB No. 8, slip op. 1 fn. 3, & slip op. 28-29 (2011) (no violation where employer demonstrated that it attempted but failed to obtain requested information), enfd. 700 F.3d 551 (D.C. Cir. 2012). Such a good-faith effort is not discernible in AMT's dismissive rejections of the Union's information request.

30 The Respondent's failure to provide the Union with the schedule of benefits, deductibles, and maximum out of pocket cost information for its plan, as well as updated rates, is a violation of the Act. The Respondent's failure to demonstrate a good-faith effort to obtain the requested MKM health information is also a violation of the Act.

⁴³I note that there is not the slightest hint in the record of any fear of the Union or threats or retaliation of any kind by the Union.

¶18 of the Complaint
Bargaining in Bad Faith

The complaint alleges that by its overall conduct—including certain conduct specifically identified in the complaint at ¶¶11,⁴⁴ 14,⁴⁵ 15,⁴⁶ 17,⁴⁷ 18(b),⁴⁸ and 19⁴⁹—the Respondent has failed and refused to bargain in good faith with the Union, and, therefore, refused to bargain collectively with the Union in violation of Section 8(a)(5) of the Act.

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(d) of the Act defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” A “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002).

“In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” *Public Service Co.*, 334 NLRB 487, 487 (2001) (internal citations omitted). From a party’s total conduct both at and away from the bargaining table, the Board determines whether the party is “engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Id.* In determining whether a party has failed to bargain in good faith, a wide range of indicia

⁴⁴Wiese’s disparagement of the Union at the July 27 employee meeting.

⁴⁵The direct dealing and bypassing incident discussed above.

⁴⁶The unilateral changes discussed above.

⁴⁷The failure to provide requested information discussed above.

⁴⁸Informing the Union during negotiations that it was not interested in a contract and that it would not have the Union at its facility; proposing a contract with durations of the date of signing until cancelled by Respondent, or until either party provides 60 days notice to terminate, and durations of 20 years or day to day; proposing a management rights provision allowing it the right to take unilateral action on unit employees’ terms and conditions of employment and warning the Union that it would add to or modify the proposal the longer and more difficult the negotiations were; questioning the union about whether it had support of a majority of the unit employees and asking the union for evidence of its support; proposing a recognition provision conditioned on the Union providing proof of certification and evidence that it represented a majority of the unit employees; proposing a breach of agreement provision that provides for the termination of the contract in the event of breaches and prohibits the union from thereafter representing the union employees for two years; proposing that all union representatives be elected and informing the union that it would not deal with union representatives who were not elected.

⁴⁹Insisting as a condition of continuing bargaining on or about September 20, 2012, that the Union agree to permit tape recording of bargaining sessions, and refusing to meet thereafter because of the Union’s refusal to permit the tape recording.

can be looked to, including statements of the parties, unlawful unilateral changes, bypassing of the union, and whether the manner and combination of proposals evidence an intent not to reach an agreement. *Regency Service Carts, Inc.*, 345 NLRB 671 (1989).

5 It is a statutory requirement that good-faith bargaining “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. §158(a)(5). At the same time, the employer is “obliged to make *some* reasonable effort in some direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), citing *NLRB v. Reed & Prince, Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953).

10 “Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining.” *Public Service Co.*, supra at 487–488, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), aff’d. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). Further,

20 An inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer’s bad faith. See *A-1 King Size Sandwiches*, 265 NLRB [850[,] 859 [(1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984)].

25 *Public Service Co.*, supra at 487–488 (footnote omitted); *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (in assessing bad-faith bargaining, “an examination of the proposals is not to determine their intrinsic worth but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement”).

30 In this case, the indicia of bad-faith bargaining may be found at and away from the bargaining table, in nearly every aspect of the Respondent’s relationship with the Union. Viewed in combination—in its totality, as the Board instructs we are to view it—there can be little doubt that the Respondent’s conduct violated the statutory duty to bargain in good faith. Indeed, in this case one is struck by the congruence and interplay of conduct hostile to the precepts of the Act carried out by the Respondent both at and away from the table. The Respondent used the bargaining process to further its campaign to divide the employees from the Union, and used the campaign directed at employees to undermine the bargaining with the Union. In sum, the evidence reveals an attitude toward the bargaining process that manifestly evinces overall bad faith and an intent not to reach agreement.

Away-from-the-table bad indicia of bad faith

In this case there is a broad range of away-from-the-table conduct suggestive of bad faith. Notable is that all of it, even that which is far removed from the bargaining process, relates to the Respondent's overall effort to delegitimize the Union, which in turn, was used to undermine bargaining. Thus, the unlawful interrogations of two employees about union meeting attendance were—relatively speaking—minor and limited occurrences. Yet, the interrogations—particularly Vogt's interrogation of O'Bryan—appears to be part of a fixation of the Respondent on seeking support for its persistent effort to undermine bargaining by claiming that the Union lacked majority support. More on that below—but for now the point to be made is that even the unlawful conduct seemingly unrelated to bargaining fits into the larger picture of bad-faith bargaining.

More directly suggestive of bad-faith bargaining is unlawful conduct such as the direct dealing with employees to resolve overtime issues instead of with the Union, and the failure to provide requested information. In those cases, both violations reflect the Respondent's effort to act with and on behalf of the employees to the detriment of the Union and the bargaining process. The direct dealing is one more example (the unilateral implementations are the most frequent example) of ignoring the Union in its operation of the plant. The Respondent simply solicited employee input and volunteers without even a nod to the Union or the bargaining process. When the Union sought information on the volunteers, the Respondent refused on the basis, Wiese claimed, that the Respondent did not believe that the Union represented the majority of employees and, therefore, the information would be provided only upon the consent of individual employees. The themes of the illegitimacy of the Union as the collective-bargaining representative, and the Employer's interposition of itself as the representative of employees are unmistakable—and wholly at odds with the Respondent's duty to bargain under the Act. Thus, these violations are further indicia of bad-faith bargaining. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (failure to provide information may be an indicium of bad-faith bargaining); *Thill, Inc.*, 298 NLRB 669, 672 (1990) ("direct dealing support finding of overall bad-faith bargaining, as "conduct was calculated to undermine the Union in the eyes of the employees and unfairly weaken its bargaining strength"); *enfd. in part*, 980 F.2d 1137 (7th Cir. 1992).

Further away-from-the-table support for a finding of overall bad-faith bargaining is found in the multitude of unilateral changes implemented by the Respondent. These were carried out with impunity, without regard for its bargaining obligations. As discussed above, from before negotiations began and throughout the period of negotiations, the Respondent made numerous unilateral changes without consulting the Union: it discontinued providing free coffee, transferred work out of the bargaining unit, unilaterally implemented an attendance policy, removed the union's bulletin board, implemented additional optional insurance, and implemented a blatantly unlawful no-solicitation no-posting work rule. All of this should have been done with notice to and in consultation with the Union. None of it was. The only unlawful unilateral change it consulted with the union on before implementing was the substantively unlawful no-solicitation no-posting work rule which was implemented over the objections of the Union. In a very real sense the record demonstrates that the Respondent operated the facility as if the Union did not exist—as if it did not recognize the Union.

It is well-settled that such actions are indicia of a lack of good-faith bargaining. *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5 (2011); *Bryant & Stratton Business Institute*, 321 NLRB at 1044 (unilateral changes may reflect on the Respondent's intent not to bargain in good faith).⁵⁰

5 These violations—which involve multiple instances of conduct at odds with and
dismissive of the Respondent's obligation to bargain—provide a window into the Respondent's
unlawful attitude toward collective bargaining. And they do so, in particular, when these “away-
from-the-table” violations are placed across the background tapestry of the Respondent's
10 active campaign to use the bargaining process to undermine the Union and interpose itself
between the Union and employees. While ignoring the duty to notify the union and bargain
changes in the operations, AMT conducted an ongoing and pervasive campaign to undermine
the Union in the eyes of employees, to interpose itself between the employees and the Union,
and to claim that it—and not the Union—was the source for protecting their interests.

15 The tentativeness of the Respondent's commitment towards collective bargaining, and
its unwillingness to accept the statutory premise that the Union—not the Employer—spoke for
employees in negotiations, was evident from the start. Before negotiations commenced, Wiese
wrote to the Union on February 1, 2012, introducing himself and announcing his intention to join
the upcoming “discussions about the possibility of a union agreement for the employees here.”
20 The next day, Wiese addressed the employees and promised them that in the upcoming
negotiations “Hart [Vogt] and I will represent you well as the employees of AMT.” In that
February meeting Wiese told employees that the “IAM has the legal right to represent you for a
year. You cannot replace them whether you wanted to or not. You cannot go to a different
union. You cannot vote them out.”

25 By March, Wiese was posting union notices and adding his own comments with his
name signed or initialed so that there would be no mistaking the source, and letting employees
know that “good employees get increases—bad employees get unions.” Although unalleged as
an independent violation, Wiese's notice to employees in March 2012 that “good employees get
30 increases—bad employees get unions” speaks volumes about how employees could expect to
be rewarded and by whom. The answer is not through collective bargaining.

35 The propensity of Wiese to purport to speak for employees, rather than to let the
bargaining representative speak for them was on full display when Wiese filled out and posted
his signed response to a union questionnaire answering on behalf of himself and “all AMT

⁵⁰I note that the Respondent unlawfully implemented many changes “beneficial” to employees. This is not a mitigating factor in considering whether the Respondent satisfied its statutory duty to bargain in good faith. As the Board recognized many years ago:

The Board has frequently had occasion to point out that the unilateral granting of a wage increase during the course of negotiations with the legally constituted bargaining representative of its employees is a violation of the Act. Such action necessarily has the effect of undermining the representative status and prestige of the bargaining agent. To be sure, the Board has recognized that such wage increases can, unilaterally, be made legally effective once the parties have reached, as a result of good-faith bargaining, an impasse in the bargaining negotiations. However, even under such circumstances, the wage increase must not be put into effect in such a way as to disparage the bargaining agent or undermine its prestige or authority.

Reed & Prince Manufacturing, 96 NLRB 850, 856 (1951) (footnotes omitted), enf'd. 205 F.2d 131 (1st Cir. 1953), cert. denied, 346 U.S. 887 (1953).

employees” and stating that “No,” he and “all AMT employees” did not want the Union to represent them and that they would not attend a union meeting discuss issues pertaining to MKM and AMT.

5 By this point, Wiese and AMT are engaged in an aggressive antiunion campaign—as if a representation election was pending—dedicated to undermining the employee/union relationship, and the prospect of a future decertification is barely veiled. In March Wiese and Vogt wrote to employees stating:

10 At this time, we do not have the legal right to deal directly with you on wages, benefits and terms of employment, even though we believe that doing so is the best way in this day and age. More than 90% of all private sector employees have chosen to be union-free. So think carefully for your future in responding to the card distributed by the Union. Ultimately it is your individual choice and right.
15 You decide whether the Union stays or whether it goes.

The conceit that AMT management and Wiese, and not the Union, spoke for and represented the employees in regards to terms and conditions of employment is, of course, at odds with the premise of the Act. The conceit, however, was not merely opinion, but acted on in
20 ways that undermined the bargaining process.

Wiese used the July 27 employee meeting to turn the Respondent’s unlawful bargaining conduct into a cudgel with which to discredit the Union, although he had to significantly misrepresent the facts to do so. After announcing to employees that “we will fight to preserve
25 your individual rights,” calling the union flyers “lies,” and asking employees “not to pay any attention to them,” Wiese turned his attention to the 16 “noncontractual” items that represented discrete terms and conditions that, for the most part, AMT had already implemented or planned to implement unilaterally and unlawfully. He told employees, falsely, that the Employer had already implemented many of them “because we thought the union abandoned you,” a claim
30 useful for undermining support for the Union but without legal or factual force.⁵¹

Wiese then falsely told employees that many of the 16 were items “the Union didn’t want in the contract.” Wiese then falsely told the employees that the Union had not responded to the Employer’s proposals on any of these items. He suggested, falsely, that AMT was going ahead with the items because of the Union’s lack of response. Then, Wiese moved to misrepresent to
35 employees that the unfair labor practices filed by the Union over the unilateral changes were an

⁵¹The Respondent acknowledges (R. Br. at 84), as it must, that as a legal claim the claim of “abandonment” does not meet the Board’s standard for terminating the duty to bargain. As a rhetorical device for Wiese to deploy in the meetings with employees it was disingenuous. Obviously it would have been a better bargaining process if the parties had not stopped meeting from February 9 to July 25, 2012. But Wiese’s suggestion that AMT believed the Union had “abandoned” the unit is not credible. First, many of the unilateral changes were implemented before the first bargaining session on February 9 and after the Union’s December 8, 2011 demand for bargaining (change in coffee, transfer of bargaining unit gauge calibration and tool crib work). Second, the hiatus in bargaining was a mutual one. Either party could have contacted the other if they were interested in bargaining and there was no suggestion in anything the Union said at the bargaining table on February 9 that it was abandoning the unit. To the contrary, in March and April the Union handbilled and communicated with employees—Wiese knew about and vigorously responded—so the claim that he believed the Union abandoned the unit is patently unbelievable. AMT’s duty was to provide the Union with notice of proposed changes, and it chose not to do so.

effort by the Union to prohibit AMT from making beneficial changes for employees. Wiese went through several of the unilateral changes that were the subject of a union Board charge and suggested that the union didn't want AMT to give employees the benefit. Wiese told employees, "I guess the IAM doesn't want" the life insurance increase, or the \$100 gift given to employees in December, or the ALFAC "voluntary" insurance, or the subsidized coffee. Wiese stated, "[n]ow AMT is going forward with all of these. We have a business to run. Marketta make sure that the life insurance increase is effective Monday morning and the additional holiday is put on our AMT schedule."

Wiese's presentation would have been even more effective had he been successful during the previous day's bargaining in his efforts to egg the Union into demanding rescission of the unlawfully implemented benefits for employees. The Union did not bite, but this did not deter Wiese from portraying the Union's unfair labor practice charges as evidence that the Union opposed the benefits the Respondent unilaterally provided to employees. Although he had to make up a premise to do so—as the Union had not expressed opposition to these benefits, only to the unilateral implementation of them—Wiese's gambit was clearly designed to prove to employees that AMT's unlawful bargaining conduct benefitted them and falsely suggested that the Union's filing of charges was designed to hurt the employees.

Wiese followed up this performance with a series of rhetorical questions designed to stress AMT's support for employees and the Union's opposition to employees, such as "the Union couldn't offer . . . you anything better, they need to get off our backs."

All of this is precisely the type of "disparaging [of] the Union [by] casting doubt in the minds of the membership as to the *bona fides* of the efforts of union representatives in advancing the interest of its membership" that the Board condemns as evidence of a violation of Section 8(a)(5). *General Athletic Prods. Co.*, 227 NLRB 1565, 1575 (1977). This is precisely the use of implementation of changes that, even when lawfully implemented—which they were not here—"must not be put into effect in such a way as to disparage the bargaining agent or undermine its prestige or authority." *Reed & Prince Manufacturing*, 96 NLRB at 856. Wiese's attacks on the union "both specifically and reasonably interpreted" amount to a

claim that Respondent is the true source for protecting the employees' interests rather than the employees' representative with such claims as the company's offer being a fair one while the union is presented as unfairly punishing employees. This provides a basis to conclude the Respondent unlawfully sought to undermine the Union's status as the employees' representative in order, plainly, to further its [unlawful bargaining] goal instead of sticking to collective bargaining matters to the detriment of the latter and in derogation of its duty to bargain in good faith.

Facet Enterprises, 290 NLRB 152, 174 (1988) (see also, *Facet*, supra at 153 ((8(a)(5) violation where employer's communications disparaged union)), enfd. in relevant part, 907 F.2d 963 (10th Cir. 1990).

This line of attack on the union was repeated again, August 23, when the Respondent posted a copy of its August 1 proposal with handwritten annotations by Wiese. On the cover page setting forth the parties to the agreement, the IAM (International) was struck out in pen and, Wiese wrote: "Company asked to add employees—Union rejected." On the page of the proposal setting forth the proposal on union representation at AMT, a portion of the proposal references "the duly elected representative on the Shop Committee or steward" Wiese

circled “duly elected” and wrote in the margin, “Company insists for you.” Wiese also wrote on the bottom half of the page: “Company rejected shop steward being appointed by IAM. AMT insist employees be given their right to cho[o]se and vote. Don’t take away employees rights!”

5 As the judge in *Hydrotherm, Inc.*, 302 NLRB 990, 1004–1005 (1991), explained, in reasoning and conclusions adopted by the Board:

10 The obvious intendment and effect of this direct communication with bargaining unit members was to disparage the Union and make the claim that it was the Company, not the Union, who was looking out for them in negotiations. While an employer may direct communications to unit employees during negotiations under certain circumstances, an effort “to portray the employer rather than the union as the workers’ true protector remove(s) such speech from the penumbra of protection and may constitute an unfair labor practice.” *NLRB v. United Technologies Corp.*, 789 F.2d 121 at 134 (2nd Cir. 1986). While the General Counsel does not allege that this letter was per se an unfair labor practice, it is certainly convincing evidence of overall subjective bad faith on the part of the Respondent.

20 And of course, all of these attacks on the Union and the representational premise of the collective-bargaining system did not occur in a vacuum. They occurred as part of an overall pattern of egregious conduct at the bargaining table.

At-the-table indicia of bad faith

25 In the first instance, the Respondent’s bad faith was revealed in the cascade of statements expressing hostility to the bargaining process from the first day of bargaining. See, e.g., *Enertech Electrical Inc.*, 309 NLRB 896, 899–900 (1992) (Board finds bad-faith bargaining in part by examining statements). Moreover, as discussed below, the Respondent’s sentiments were reflected in its proposals.

30 For instance, at the parties very first meeting, Vogt told the Union bargainers, “we . . . don’t believe [we] need a contract for this company” because AMT doesn’t “abuse their employees.”

35 Wiese’s contemporaneously-taken notes from the meeting state:

40 Need to explain why AMT should contract with Union; what is the benefit. We see your contract; we offer blank contract. We see no need for a contract.

45 Consistent with the Respondent’s stark admission that “we see no need for a contract,” Vogt “counterproposed” to the Union by handing the Union a blank sheet of paper ripped from a pad and announcing that this was the Respondent’s proposal. Asked for his counterproposal again, Vogt responded: “we’ve given you a proposal, no contract.”

50 In light of the statutory requirement of good-faith bargaining to reconcile differences and achieve an agreement, these comments stand as stark admissions of bad faith, and provide evidence that all that followed reflected pretense and not the “spirit of cooperation” required to “satisfy the requirements of the Act.” *Mid-Continent Concrete*, supra at 259.

It is also hard to ignore the argument-for-arguments-sake quality of many of Wiese's salvo's at the bargaining table. For instance, when the Union wanted to talk about health insurance, Wiese demanded that the Union undertake to pay unpaid health insurance claims owed to employees by MKM. Wiese said, "You need to pay these unpaid health claims for these employees as you promised. I want you to pay this \$239,000." Notably Wiese and Vogt used this specious argument to attack the Union in a letter to employees, posted March 16, 2012,⁵² and chided the Union in correspondence dated July 19, for failing to pay the insurance claims. These arguments, at a minimum are disingenuous and waste time in bargaining, but in context reflect the challenge to the basic precepts of the Act and bargaining advanced at every turn by the Respondent.

In similar vein, Wiese took up time in negotiations arguing about the wisdom of the Respondent's own proposals. On August 1, he waxed philosophically against bereavement pay, and when the Union confronted him with the fact that the Respondent had proposed it, he declared, "I'm rethinking this." Later that day, Wiese and Vogt argued that the Employer should not have to pay for jury pay since it provided no benefit to the Employer. Again, the Respondent had at all times proposed jury pay. Similarly, in response to the Union's argument in August 1 negotiations for a higher minimum wage scale than that proposed by the Respondent, Wiese objected to there being any minimum rate, stating that "if the best workers in the plant want to subsidize the worst workers, they can just write a check to them, instead of having it reflected in the contract." Of course, the Respondent had already proposed a minimum rate.

And it is worth noting as well, the constant unfounded attacks on the Union by Wiese for allegedly bargaining in bad faith, or being unproductive, that marked most bargaining sessions. Wiese repeatedly implied that he would not set bargaining dates, and not continue bargaining unless the meetings were more productive. These criticisms served no purpose other than to attempt to blame the Union for the Respondent's own bargaining misconduct.

In isolation, many of these types of comments made by Wiese (and sometimes by Vogt) have a sophomoric wisenheimer quality to them, evincing a predilection for meaningless argument as opposed to problem-solving. But over time and the context of its substantive proposals it became clear that Wiess and Vogt's querulous bargaining style was designed to frustrate the process. Wiese was not discreet. As he told the union bargainers: "we don't want to stop the IAM from doing business, just from doing business with AMT."

One key indicium of the Respondent's bad-faith approach to bargaining may be found in the Respondent's relentless focus on asserting that the Union did not enjoy majority support among employees and its demand that the Union prove that it was certified and entitled to be the employees' bargaining representative.

The harping on this theme during bargaining—what the General Counsel aptly describes as "exhausting verbal challenges to the Union's majority support"—was neither infrequent nor innocuous. It was deployed repeatedly as a response to multiple union bargaining demands and wielded as a rationale for the Respondent's unwillingness to agree to union requests. It was reflected in repeated bargaining proposals, and it undermined the bargaining process,

⁵²The letter stated: "It was MKM and the Union who promised certain benefits and seniority in the past; not AMT. Unfortunately, MKM closed, and as far as we can tell, the Union has not offered to make these benefits up to you, even though they gladly collected your dues for many years."

interfering with the negotiations and adding consequence to the constant suggestion of the Respondent, both at and away from the bargaining table, that the Union was not the legitimate representative of the employees.

5 From a legal perspective, of course, the claim that the union lacked majority support was a meritless argument. But most important, the issue was raised repeatedly as a bargaining stratagem of the Respondent used to undermine the bargaining process and the legitimacy of the Union's status.

10 Even before bargaining began, in response to the Union's request for bargaining unit contact information, Wiese declared that he was "uncomfortable" providing this information and asked for the "IAM certification/representation identification for this location."

15 The issue never went away. In July 25 negotiations, "Wiese said no to the recognition clause, unless the Union furnishes him with official certification of the Union's exclusive representation." The next day, in bargaining on July 26, Wiese again raised the question of whether the Union represented a majority of employees. Wiese disagreed with the Union's assertion that the Union was the bargaining agent by virtue of successorship. Wiese asked Cutler if the employees want the Union and Cutler said yes. Wiese replied, "not from what I'm
20 hearing." During bargaining on August 1, Cutler's demand for the names of the employees who volunteered for the (unlawfully offered) weekend crew was rejected on the grounds that AMT doesn't "believe that the Union has demonstrated that it represents the majority." The issue came up again later that day in negotiation, during a discussion of work rules, Wiese stated that the lack of employees wearing union buttons "showed him that the union lacks majority
25 support." Wiese continued in this vein, calling the Union's alleged lack of majority support "a critical issue" in negotiations.

Time and time again Wiese justified his responses to proposals on the issue of the Union's alleged lack of majority support. He told Cutler on August 1 that he would respond to a
30 union check off proposal only when he learned how many employees were paying dues. He conditioned the furnishing of requested union information on the overtime volunteers on the Union providing evidence of majority support. On the same day, Wiese conditioned his response to the Union's proposal on a union committee to a showing of majority support. Wiese said that "he doubted the Union's majority status, and declared that the parties were at impasse."
35 Wiese insisted that "the Company would deal with a steward who has . . . at least 50% of the vote behind him." On the subject of union recognition, Wiese repeatedly interposed the issue of majority support and on August 15 told the Union that "he won't change the Company's position until he gets that information, a certification from the Labor Board." On August 28, Wiese again raised the issue of the Union's alleged lack of majority support. The next day, on August 29,
40 Wiese sent an email to Stivers that included, the complaint that "[t]he IAM has had over 9 months to present itself to the employees. We are doubtful that the IAM has the support of these workers." Wiese attached proposals that conditioned the proposed recognition clause on the Union providing evidence of its certification.

45 The important point here is that the litany of incidents in which the Respondent questioned the Union's right to bargain on behalf of employees was not merely rhetoric. Time and time again the bargaining proposals and the bargaining progress were directly impacted by the Respondent's unwillingness to accept the union's status as bargaining representative under the Act.

50

This is powerful evidence of an attitude and mindset that is not interested in good-faith bargaining. “[T]he Respondent’s conduct strongly suggests that the Respondent was focused more intently on the prospect of a termination of its bargaining obligation through the Union’s loss of the faculty members support than on the successful negotiation of a collective-bargaining agreement.” *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (“In the instant case the Respondent’s representatives frequently referred to the slim margin of the Union’s majority and the Respondent’s belief that the Union lacked faculty support for its demands”). See, *Prentice–Hall, Inc.*, 290 NLRB 646, 646 (1988) (“it is reasonable to infer from the totality of the evidence that the Respondent had no real intent to reach a collective-bargaining agreement with the Union. Rather, it behaved as if it was counting on the chance that the slim majority by which the Union won the election (a fact that Respondent’s negotiator commented on more than once) and the passage of the certification year without any real prospect of a contract would culminate in a sufficient expression of employee dissatisfaction to permit the Respondent to do what it finally did when the certification year ended—withdraw recognition on the basis of an asserted good-faith doubt of union majority”).

The Respondent’s obstreperous conduct at the bargaining table was consistent with the substance of its proposal which evinced bad-faith bargaining at many junctures. Consistent with the Respondent’s challenge to the Union and the bargaining process, the proposals it made in bargaining consistently evince contempt for the role of the Union and its rights. They reflect insistence by the Employer on almost total unilateral control of key terms and conditions of employment. I review just a few below:

Recognition. Consistent with its persistent questioning throughout negotiations, the Respondent’s contract proposals on recognition reflected an unwillingness to accept the Union as the representative of the bargaining unit employees.

Repeatedly, the Employer proposed recognition clauses that not only were expressly conditioned on a demand that the union provide documentation of Board certification, but that were substantively an amalgam of legal misstatements, truisms with no relationship to recognition, and fundamentally a denial of the Union’s right to represent the bargaining unit.

Its initial recognition proposal (dated July 24, provided to the Union July 19) stated:

The Company, the Union, and all of AMT’s employees recognize that the State of Indiana is a Right to Work State and that no employee is required to join a union or pay union dues to work at AMT. No employee is contracted to continue work against their will, and that they have the right to terminate their relationship at will. That is their right.

The company also has the right to terminate the employer/employee relationship at will. That is the Rights [sic] of both parties in a Right to Work State. However, the Company will grant to the IAM certain limited rights of union representative successorship based on the fact that certain past employees of another employer at the same location previously, to act as the sole and exclusive representative of the dues paying members of Lodge 681 through its District 27 of the IAM of the Employer, excluding office employees, administrative, shipping-receiving, outside sales, quality, and all supervisory and salaried employees, for the purpose of collective bargaining with respect to wages, rates of pay, hours of employment, and the adjustments of breach of this agreement which may arise between the parties.

This “recognition” proposal is evidence of an employer that is not seeking an agreement. It proposed exclusion of huge swaths of the historic bargaining unit from recognition, and proposed “limited rights of union representative successorship” to represent only “the dues paying members” of the Union, not, as the law requires, the entire bargaining unit.

The limitation of recognition as the representative of only “dues payers” was removed in the Employer’s August 1 proposal, but a new clause 2.3 was added stating:

Failure of the Union to fairly and adequately represent the interests of non-dues paying members of the Collective Bargaining Unit shall constitute a violation of the Indiana Right to Work legislation and is a material breach of this agreement.

The diminution of the scope of the described unit was corrected in the Employer’s August 29 proposal, but the August 29 proposal continued to state that the Union would have “limited rights” and inserted—for the first time—the demand that recognition be “based on demonstrated majority support for the elected union.”

In September the Employer advanced the same proposal, with a drafting note stating that proof of the Union’s certification and/or legal authority was a condition of its proposal. Article 2.3 remained part of the September proposal.

In addition to the substantive refusal to fully recognize the Union, the off-the-point, ranting quality of the proposal is noteworthy. It makes erroneous claims about Indiana Right to Work law (which does not require at will employment, and which is not violated by the union’s failure to represent the interests of non-dues payers); it recites what must be, in context, considered bizarre statements about employees’ rights not to be required “to continue work against their will”; it declares that the agreement is materially breached—and thus, as defined elsewhere in its proposals—terminated based on a failure to “fairly and adequately represent non-dues payers.”

This is a proposal that is not only far worse than the rights the union would have without a contract, it is, at odds with what the law permits, and it focuses on right-to-work law that has nothing to do with the topic of union recognition. This is the proposal of an employer that is fundamentally serious about not reaching agreement. It is hard to conclude anything other than that the Union and its role as the representative of the employees is being mocked, not accorded its rightful representative status.

A basic indicium of bad faith is making recognition a “bone of contention.” *Burrows Paper Corp.*, 332 NLRB 82, 93–94 (2000). Wiese should know this, since he was a chief actor in *Whitesell Corp.*, 357 NLRB No. 97 (2011), in which similar tactics were condemned by the Board. *Whitesell Corp.*, 357 NLRB at slip op at 2 (“As a recognition clause costs the Respondent nothing, and simply embodies the employer’s legal obligation, it should have been the easiest provision to accept”).⁵³

⁵³While conceding that a recognition clause is “typical in most collective-bargaining agreements,” the Respondent argues (R. Br. at 99) that it is not a mandatory subject of bargaining and that the “Respondent had no legal obligation to include an actual recognition clause in the agreement.” Assuming, arguendo, the truth of that, it is beside the point. The Respondent does not have a legal right to bargain in bad faith and it is an indicium of bad faith when an employer relentlessly advances recognition proposals that contest a union’s representational status.

Moreover, in the context of other indicia of an unwillingness to recognize that the employees relationship was subject to collective bargaining, the Board considers it a further indicium of bad faith to insist on proposals that the employees status remain at-will. See, *Santa Barbara News-Press*, 358 NLRB No. 141 (2013), reconsideration denied, remedy modified, 359 NLRB No. 127 (2013). The Respondent demanded this very point throughout negotiations and no matter the Union's objections.

Unlawful proposal on hand billing and other rights. A version of the unlawfully implemented restriction on solicitation and posting, discussed above, continued to be proposed for inclusion in a labor agreement, and formed part of the Respondent's September 20 proposal, its last proposal entered into the record in this case. Moreover, its "picket line recognition" provision prohibited handbillings, leaflets, flyer distributions, by the Union or the "CBU" (i.e., collective-bargaining unit) "on the subject of AMT, or near the company's facility covered by this agreement." According to the proposal, a breach of this provision would "immediately terminate the agreement in its entirety." This insistence on unlawful provisions that restricted employee rights to discuss and advocate for the union, on pain of termination of the agreement, is a further indicium of bad faith toward the bargaining process.⁵⁴

Employees party to the agreement. Another example of the Respondent's approach to bargaining and the role of the Union as the employees' representative was its repeated demands that the employees be named as parties to the agreement. From its first July 24 proposal, AMT added the "members of [the Union] as a listed party to the cover page. The proposal for an "Introduction" also listed "the employees and the work force . . . (hereafter referred to as 'Employee' or collectively as 'Employees'" as parties. Variants of this were repeated in all of the Respondent's proposals, and even its final September 20 proposal retained the employees as parties in the introduction (while removing it from the cover). The Union's oral objections were met with declarations by Wiese that the Union "does not exist as a legal entity," and the Union's written objections were met by written responses such as "Company sees no reason to change. Please provide us a rationale and reason for a change." It is with reference to the Union's objections to this proposal that Wiese warned "these aren't going to be traditional negotiations" and "this is not going to be a traditional contract."

In light of this, and all the other evidence of the Respondent's rejection of the Union's statutory role, Respondent's contention on brief that objections to its conduct are "puzzling" and "difficult to comprehend" cannot be taken seriously. The Respondent's insistence on naming employees as parties was consistent with and part of its effort to undermine the Union's status as the party designated to represent the unit employees and enter into contracts covering their terms and conditions of employment. On brief the Respondent breezily implies that naming the employees as parties would not make any difference to their rights or to the Union's. I am not convinced of that, but I will assume, arguendo, that is so. In that case the Respondent's

⁵⁴Both proposals, in their September 20 versions, professed that the patently unlawful prohibitions on solicitations, postings, and handbilling, set forth in the proposals, "shall in no way prohibit any individual employee the free exercise of his individual rights how he independently cho[o]ses." If the Respondent believes this somehow saves these provisions from condemnation, I believe that is incorrect. To the contrary, the stated protection of "individual rights" underscores the discriminatory treatment the Respondent would accord to any expression of opinion related to or by or on behalf of the Union.

insistence is purely symbolic—a symbolic reflection of its subjective unwillingness to accept the Union, as the Act states, as the “exclusive representatives of all the employees in such unit for the purposes of collective bargaining.” Section 9(a) of the Act. Under the Act, when a union has been properly designated as the exclusive collective-bargaining representative, employees no longer represent themselves and they may no longer deal individually with the employees to determine terms and conditions of employment. The Respondent’s insistence on naming the employees as a party to the contract—even if symbolic, is at odds with the representation process established by the Act and provides further evidence of the Respondent’s bad faith.⁵⁵

Management Rights; and Guidelines, Rules and Regulations, and Disciplinary Actions. The self-described “heart and soul” of the Respondent’s proposal was its management’s rights proposal. The proposal, even in its most recent form, proposed September 20, is sweeping in its scope, providing the Respondent unfettered discretion over nearly every function of administration of the facility.

For instance, Section 3.2 of the September 20 proposal states that “The Employer retains the exclusive right to manage the business and the plant and to direct the workforce. All other rights and authority, whether listed here or not, are solely retained by the Company, and are hereby recognized by the parties to this Agreement, including but not in any way limited to the following” An introductory clause like that simply leaves nothing out.

The remainder of the clause provides a dizzying array of management rights. The Respondent’s proposal provides that it “solely retains” all rights and authority, “including but not in any way limited to . . . the right to hire, fire supervise, promote, transfer, assign, re-assign, determine the work to be performed, the persons to perform it, demote, disqualify, lay-off, recall employees, require overtime, discipline, suspend, terminate, or discharge, the right to assign or reassign employees and to combine jobs; . . . the hours of work, the shift schedule and length of each shift or not shift. . . the right to contract work out or to purchase complete parts, components or assemblies, direct, plan, control, relocate, sell or cease operations; assess and determine the need of its operations, including moving the plant or any of its parts to other areas, subleasing space or equipment to other related or independent companies than AMT, and the types and amount of work to be handled at each and all of its operations.” The proposal provided that “it may be necessary at times for salaried, supervisors, consultants, advisors, production efficiency advisors, or management to perform any AMT work at any time.” The Employer retained [t]he right to institute, change, modify, or eliminate production operating guidelines, work rules, policies, practices, procedures, and regulations relating to the operation of the plant and the conduct of employees, the right to establish and set efficiency and production standards, set performance and production improvements.

⁵⁵The Respondent attached to its brief copies of purported tentative agreements on the cover page and introduction to the labor agreement entered into by the parties a few days after the close of the hearing which showed that the parties had agreed on language, as insisted upon at all times by the Respondent, naming the employees as parties to the agreement. The Respondent moves (R. Br. at 27 fn. 19) to reopen the record and admit these documents. The General Counsel filed an opposition. I deny the motion. Assuming, as I do, that the documents are as represented, their consideration would not require a different result, which is a required showing by the movant under Board rules and Board precedent. Board Rules and Regulations 102.48(d)(1); *Fitel/Lucent Technologies*, 326 NLRB 46 fn. 1 (1988). Evidence that the Union ultimately gave in months later to certain tactics I have adjudged to part of a scheme of overall bad-faith bargaining is not exculpatory.

The only constraint on management action was that employees will not be disciplined for “arbitrary reasons.” At one point, the Respondent agreed to provide that “[t]he Company will make every effort to avoid layoffs or denial of overtime opportunities caused by contracting out.” However, this was removed from the Employer’s proposal after August 29, and remained
 5 absent from its September 20 proposals. And the Respondent could not even agree to language stating that management rights were limited “where limited by this agreement.” On July 25, Wiese told the Union he didn’t “like that language, but said he would agree to it anyway.” However, after agreeing to it, the Respondent struck that limiting language from its August 1 counterproposal, and at August 15 negotiations Wiese agreed that the statement was
 10 correct that management rights was limited “where limited by this agreement” but still said that he “cannot live” with such limiting language in the agreement.

In addition, as of September 20, the last set of Employer proposals in evidence, the Respondent stuck to its position that that the disciplinary rules set forth in its guidelines, rules
 15 and regulations and disciplinary actions proposal were “only guidelines” that, under the proposal, could be abandoned and changed at any time. This proposal restated the Respondent’s vast unilateral discretion and provided that the Employer “solely maintains and determines personnel policies, production operating guidelines and procedures,” and reserved the right to change and modify such policies and guidelines. Under this proposal, the only
 20 limitation on the Respondent’s disciplinary power was a pledge not to discipline for arbitrary reasons.

Notably, these proposals for retaining discretion over nearly every workplace standard are accompanied by a wage proposal that provides for discretion in terms of setting and
 25 adjusting wage increases for individual employees (subject to a contractual minimum of \$8 an hour for operators and \$16 an hour for skilled machinists). As of August 15, the Respondent added a provision to its wage proposal making clear that its decisions on wage increases could not be grieved. It also proposed benefits that are not “guaranteed or contracted for the term of this Agreement.” The Employer further maintained proposals under which relative seniority was
 30 relegated to almost no role. For instance, in determining layoffs, seniority was to be considered a “tiebreaker” only when other factors (such as skills, qualifications, abilities, performance reviews, team work, etc.) “are deemed by supervision and management to be relatively equal.”

The Respondent’s insistence on unilateral control over virtually all significant terms and
 35 conditions of employment requires “the Union to cede substantially all of its representational function, and would have so damaged the Union’s ability to function as the employees’ bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining.” *Regency Service Cart*, 345 NLRB 671, 675 (2005). With the contract proposed by the Respondent, the Employer could act unilaterally and at will in regard to nearly
 40 every subject that might come up during the term of the contract and that would affect the terms and conditions of employment. “Indeed, the conclusion is inescapable that the Respondent’s proposals, if accepted, would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all. Without a contract, the Union would have retained the statutory right to prior notice and bargaining over changes or
 45 modifications in terms and conditions of employment, and it would have retained the right to strike in protest of such actions.” *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001).

“An inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and employees it represents with substantially fewer
 50 rights and less protection than provided by law without a contract.” *Regency Service Carts, Inc.*, supra at 675.; *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (employer’s broad management-

rights proposal that would make futile any grievance over a discharge and almost every other aspect of wages and working conditions was evidence of bad faith). "In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith." *Public Service Co. of Oklahoma*, 334 NLRB at 487.⁵⁶

In addition, it is particularly with regard to the management rights clause that the Respondent announced, both orally and in writing, that it was serving "fair warning" to the Union. In its initial proposals, the management rights proposal contained the admonition that

The Company will continue to make additions and modifications to the management rights clause as long as we cannot come to an agreement. Fair warning. The quicker we can come to agreement will limit the necessity for clarification of this clause. The longer and more difficult the negotiations, the more clarity the Company believes this clause will require.

This "drafting note" was repeated in its August 1 proposals and orally reinforced by Wiese on August 15, when at the conclusion of a discussion of the management rights clause he told the Union, "[I] highly recommend that you seriously consider our Mgmt rights proposal. Going to be the best you get. Fair warning." Wiese also said that "every time he hears a proposal . . . from the Union, it makes him want to clarify the management rights clause." Wiese told the bargainers that when the Union makes a change to the Employer's proposal, Wiese reviews the proposal and "spices it up. Looks at it harder."

These comments—reasonably understood as threats to regress if a management proposal is not accepted, *or is even discussed*—are highly indicative of bad-faith bargaining. It is wholly at odds with the precepts of the Act and reflects the "completely closed mind" and lack of "spirit of cooperation" that "does not satisfy the requirements of the Act." Moreover, the threat was acted upon, as the Respondent regressed in the face of the Union's discussion, removing from the management rights clause even the relatively toothless promise to make every effort to avoid layoffs or denial of overtime opportunities caused by contracting out that it, in any event, had sole discretion to undertake. Notably, Wiese was a chief actor in a recent Board case in which less veiled, but essentially the same comments were found to be an evidence of a course of bad-faith bargaining.⁵⁷

⁵⁶The Respondent cites *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997) for the proposition that an employer may insist upon a provision granting it discretion to unilaterally change certain conditions of employment during the term of the labor agreement. But the discretion to award merit pay bargained for in *McClatchy*, is only a small part of the wide-ranging unilateral discretion over the broad range of mandatory subjects the Respondent is demanding here. Here, taken as a whole, the Respondents proposals evince an intent to leave the union and employees with fewer rights and less protection than that provided by law without a contract. This is a distinction that the Board recognizes. *Whitesell Corp.*, 357 NLRB No. 97 at slip op. 3 & 41.

⁵⁷The Respondent contends that any condemnation of Wiese's "warning" "reflects a basic lack of understanding as to how bargaining works in the real world." But in the "real world" such conduct is condemned by the Board, as Wiese should know. See, *Whitesell Corp.*, 359 NLRB No. 97, slip op. at 18-19.

Duration. Respondent's conduct during negotiations was often frustrating and illogical, and evidence of a lack of serious intent to bargain in good faith. A good example of this was its proposals on the first day of bargaining regarding the duration of a contract. Wiese said that he would propose the current terms and conditions, with no wage increase, for three years or 20 years duration. When the parties resumed bargaining in July, the Respondent forwarded proposals that stated on its cover, that the agreement was effective on the date signed and continued "until cancelled by the Company." This cover "duration" clause was at odds with the duration clause contained in the proposal, which provided for 60-days notice of cancellation by each party. Then on July 25, Wiese claimed falsely, that the parties had reached a tentative agreement on duration at the February 9 meeting, based on proposed contract language that left the duration clause blank. On August 1, when the Union proposed a contract of 2 years duration, Wiese said that AMT would agree to either a 60-day contract or a 10-year contract. Wiese said that the Employer liked "long-term stability" but "if we can't reach that, then we'll see." Its August 1, proposal, discussed, August 15, continued to state on the cover that the contract was effective "until cancelled by Company." This document was posted with Wiese's comments for employees on August 23. The Employer's September 20 proposal removed the cover page language providing for cancellation at the will of the Employer. That left as its duration proposal an clause that provides for termination by either party on 60-days notice, but then also, incoherently, appears to renew year to year for one year terms.

If none of this makes too much sense, I suspect that was the point. It was an effort to frustrate bargaining. In any event, "the Board has long held that absent any lawful or reasonable economic justification, a party's unwillingness to enter into a contract for a fixed term raises in and of itself a presumption that the party is not bargaining in good faith." *Massillon Community Hospital*, 282 NLRB 675, 676 (1987). Here, even assuming that the Respondent relented on its cover page proposal, until September 20, the Respondent's position was designed to thwart rather than facilitate an agreement.

No-Strike Clause. Throughout negotiations, the Respondent proposed that any violation of the no-strike clause, including any discussion of it, by the Union or any employee, was deemed a "breach of this agreement in its entirety" or a "material breach of the agreement" which would "void and moot in its entirety" the collective-bargaining agreement. To this initial requirement, proposed in July, the Respondent added to its August 1 proposal, a condition still pending as of the Respondent's September 20 proposals, that the Union's representation rights could be voided for a two year period in the event of such a violation. As of the Employer's August 1 proposal, a breach included "any intent for any known violation or discussion of such violation of this article."

I agree with the General Counsel that, at a minimum, the insistence that the Union agree to the nullification of its representational rights as a penalty for breach of contract—particularly a clause that could be violated through discussion—is an indicium of bad faith under the circumstances presented. It was inexplicably added to the Employer's proposal first in an alternative proposal on August 1, and then, August 15, as part of the exclusive proposal of the Respondent. It was presented in the context of an extraordinarily expansive no-strike clause that could be violated even by employee discussion of interference with production. To suddenly insist that the Union agree to waive its right to represent employees in the event of such a breach is just one more manifestation the Respondent's barely veiled hope to eliminate the Union's representation rights. It is not, like the waiver of the right to strike, or the waiver of the right to bargain over layoffs, a waiver designed to create a collective-bargaining accord that would facilitate legitimate objectives of the employer. Instead, it was a demand for a penalty to

free the Respondent from having to recognize the Union and strip the employees of representation. It is evidence of an employer that is not seeking an agreement.⁵⁸

Election of union representatives. The Respondent repeatedly insisted and repeatedly proposed that union committee members be elected by employees, including unit employees who were not union members. At one point Wiese justified this on the familiar grounds that “the Union needs to show that it represents a majority, and he wants to be sure that the Union does.” Wiese went so far as to claim the parties were at impasse over this issue and insisted that the Employer would not deal with a steward who had not received at least 50% of a vote. He then posted a copy of the Respondent’s proposal in the plant and wrote:

Company rejected shop steward being Appointed by IAM.

AMT insists employees be given their right to cho[o]se and vote. Don’t take away employee rights!”

The fact that the parties were not at a good-faith impasse when Wiese issued his ultimatum is beside the point. His insistence to the Union, and declaration of insistence to employees on a permissive issue repeatedly rejected by the Union undermined the negotiating process. It is evidence of an employer actively seeking disagreement on an issue that, legally, it must give way on. Not coincidentally, the nature of the issue highlights the Respondent’s bad-faith approach to bargaining: it provides one more example of the Respondent’s insistence on questioning the Union’s majority support, of interjecting itself into monitoring of the relationship between the union and employees, and of posing as the authentic representative of the employees. The Employer’s insistence on this demand—continued, in its latest September 20 proposals—is indicative of a bad-faith approach to negotiations.

Finally, the bargaining came to a sudden halt on September 20 as a result of another alleged indicium of bad-faith bargaining (§19 of the complaint). After repeated demands by Wiese throughout the course of bargaining to be permitted to tape record the bargaining sessions, the matter came to a head on September 20, 2012. Wiese, bearing a tape recorder, began the meeting by announcing that “AMT will be tape recording all further bargaining sessions.” Despite the Union’s objections Wiese refused to remove the tape recorder. He said “he was going to record the meetings, whether we agreed to it or not.” The Union left, stating that it could not bargain under the conditions set by Wiese.

As the Respondent concedes, longstanding Board precedent does not permit a party to insist over the objection of the other party, on tape recording bargaining sessions. *Bartlett–Collins Co.*, 237 NLRB 770 (1978), *enfd.* 639 F.2d 652 (10th Cir. 1981); *Bakery Workers Local 455 (Nabisco Brands, Inc.)*, 272 NLRB 1362 (1984).

However, notwithstanding the clear precedent on the subject, the complaint does not allege that constituted an independent violation of Section 8(a)(5). Here, as alleged in the complaint, the issue is whether the insistence on the tape recorder is an indicium of bad-faith bargaining. The evidence strongly suggests that it is.

⁵⁸The Respondent equates its demand that the Union be barred from representing the unit with that of a union voluntarily disclaiming interest in representing a bargaining unit. The two are as different as the difference between an employee voluntarily quitting and an employee being discharged.

In the first place, the conclusion is almost inescapable given that the unlawful insistence on taping the proceedings directly led to the cessation of collective-bargaining meetings between the parties. For over two months, until the Respondent wrote to the Union stating that “AMT advises it will not use a tape recorder during future bargaining sessions,” the Respondent’s insistence on using the tape recorder fundamentally undermined—i.e., ended—the bargaining process. Moreover, Wiese had been raising the issue of the tape recorder ever since the parties returned to the bargaining table in July but always heeded the Union’s objections. He knew the Union opposed the tape recording of meetings, and, what is more, his comments seemed to reflect an understanding that he could not unilaterally insist on the use of the tape recorder (On August 1 he called the Union’s refusal to allow tape recording a “unilateral veto.”) However, on September 20, he came to the meeting prepared to end negotiations over the tape recording issue and he did. The outcome was predictable and reasonably had to be foreseen by Wiese. The only explanation he offered was the “frivolous claims” filed by the Union, essentially an admission that his insistence on a tape recorder was prompted by and retaliation for the Union’s filing of Board charges.

Although no more is needed to conclude that the Respondent’s conduct was motivated by bad faith toward the bargaining process, the General Counsel adds the contention that the Respondent was motivated by a desire to end negotiations to forestall any chance that, despite its overall bargaining conduct, the Union was moving closer toward reaching agreement with the Employer. I believe this is the case. Notably, in the last bargaining session, August 28, Cutler was no longer present and had been replaced by Stivers as the Union’s chief negotiator. Stivers moved towards the Respondent, working from its proposals and accepting language that it had previously rejected. Although the parties remained far apart on many key issues, the prospect of a settlement might well have seemed not as impossible to the Respondent as it appeared with Cutler at the helm. The Respondent believed (as it had explained to employees) that it was duty bound to bargain for a year with the Union before its theories of the union’s lack of majority support could be tested. In the absence of any other explanation for Wiese’s sudden transformation of the tape recorder issue from a demand to a precondition for bargaining, the effort to stall bargaining makes sense. In any event, the predictable effect of Wiese’s insistence is that bargaining ceased. The Respondent’s unlawful conduct is evidence of its bad-faith bargaining.⁵⁹

In sum, the totality of the evidence—both at and away from the bargaining table—demonstrates that the Respondent’s goal was to frustrate the negotiating process. It succeeded. The Respondent’s conduct, its proposals, its constant interjection of the issue of union support into negotiations, and its meaningless and time-wasting arguments and challenges to the Union’s status doomed the negotiations. And that was before the Respondent effectively ended the negotiations on September 20 with its unlawful condition of tape recording the negotiations over the objection of the Union.

⁵⁹The Respondent argues (R. Br. at 105) that the Board should reverse its rule that parties cannot insist or condition bargaining on the use a tape recorder to record bargaining sessions. However, the Respondent also recognizes that I must follow current Board precedent. *Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied”) (citation omitted).

Based on all the evidence, I find that the Respondent's overall bargaining conduct is indicative of bad faith and is a violation of the duty to collectively bargain required by Section 8(a)(5) of the Act.⁶⁰

8(a)(3) allegations

¶12 of the complaint

Implementation of No Solicitation No Posting work rule

I concluded above that implementation of the no-solicitation no-posting work rule violated Section 8(a)(1) of the Act. The General Counsel further alleges that implementation of this work rule was unlawfully motivated and a violation of Section 8(a)(3) of the Act. I am unaware of any authority for the proposition that a facially neutral rule, even one that is grossly overbroad, and even one enacted with discriminatory intent, violates Section 8(a)(3) of the Act. The General Counsel cites *Premier Maintenance*, 282 NLRB 10 (1986) in support, but that case involved a rule that explicitly applied only to union activity. I recognize that there is evidence in the record demonstrating discriminatory enforcement of the Respondent's rule—an employee was permitted to openly wear antiunion shirts to work nearly every day and management took no steps to stop it even when called to its attention. But the complaint does not allege that as a violation and, therefore, I make no finding in that regard. I will dismiss the allegation that the implementation of the no-solicitation no-posting rule violated Section 8(a)(3) of the Act.

¶13 of the complaint

Refusal to consider for hire or hire applicants

The General Counsel alleges that the Respondent unlawfully discriminated against former MKM employees David Mattmiller and Charles Wright by refusing to hire, or consider them for hire, in violation of Section 8(a)(3) of the Act.

Mattmiller and Wright were two of three union stewards under MKM at the facility. Along with the third steward, Don Luther, who was hired by AMT, Mattmiller and Wright met Wiese and Vogt during the pre-hire "due diligence" period between July and November 2011, when Wiese and Vogt were frequently at the facility. Their personal interactions with Wiese and Vogt were limited—the exception to that was Mattmiller's encounter with Vogt, described in the text, above, regarding Mattmiller's participation in a safety and health inspection walkthrough.

Mattmiller was a quality department employee for MKM and was the sole employee whose chief duties involved gauge calibration for MKM. Wright was the sole MKM unit employee assigned to work in and maintain the tool crib for MKM.

⁶⁰I note that in finding the Respondent bargained in overall bad faith, I have relied upon numerous indicia, some that were alleged and found to be independent unfair labor practices, but many that were not alleged as independent violations of the Act. There is no need to determine if those (or any) individual acts were independent unfair labor practices, as conduct that is not an independent unfair labor practice may still support a finding of overall bad-faith bargaining. *Universal Fuel*, 358 NLRB No. 150, slip op. at 1 (2012) ("unnecessary to determine whether any of the individual acts just described was unlawful in and of itself. Instead, the Respondent's conduct, as a whole, support the judge's determination that the Respondent was not bargaining in overall good faith and thereby constitutes a violation of Section 8(a)(5)").

Significantly, the General Counsel does not challenge as unlawful the initial decision not to hire Mattmiller or Wright when the Respondent began operations, but only the failure to hire or consider them for the positions it filled internally in January 2012.

Thus, the General Counsel's allegation of discriminatory refusal to rehire or consider is not based upon the failure to hire Mattmiller or Wright in the initial wave of hiring, the weekend of December 2–4, when most of the workforce was hired. Rather, the General Counsel claims that, in Mattmiller's case, he was unlawfully not hired, or considered for hire, on January 30, 2012, the date that the Respondent promoted Craig Meredith—an MKM employee hired in the initial hiring by AMT—to the new nonunit position of calibration specialist or calibration engineer. The General Counsel confines its allegation to the claim that the Respondent unlawfully refused to consider or hire Mattmiller for this position (which the General Counsel argues is really a hyped but essentially similar position as the gauge calibration held by Mattmiller for MKM).

Similarly, the General Counsel claims that Wright was unlawfully not hired, or considered for hire, on January 9, 2012, when the Respondent promoted Kevin Kennedy—an MKM operator initially hired by AMT on December 5—to the newly created position of tool management supervisor. The General Counsel alleges that the Employer's refusal to hire or consider Wright for this position, which the General Counsel argues should be part of the bargaining unit and replaced or absorbed the tool crib operator position, was unlawfully motivated.

The Supreme Court approved analysis in 8(a)(1) or (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1993) (approving *Wright Line* analysis).

In *Wright Line* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Under the *Wright Line* standards, the General Counsel meets his initial burden by showing "(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action." *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enf'g. 314 NLRB 1169 (1994) (internal quotations omitted)). Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Williamette Industries*, 341 NLRB 560, 563 (2004).

In *Planned Building Services*, 347 NLRB 670 (2006), enfd. 325 Fed. Appx. 577 (9th Cir. 2009), the Board held that *Wright Line* provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire predecessor employees. This includes cases where many of the predecessor employees were hired, but the General Counsel alleges that the successor employer unlawfully discriminated by refusing to hire certain union

activists. *Grane Healthcare Co.*, 357 NLRB No. 123 (2011), enfd. 712 F.3d 145 (3d Cir. 2013).⁶¹

In this case, both Mattmiller and Wright engaged in union activity for MKM, and the Respondent was aware of it. Wiese and Vogt met with the stewards, including Mattmiller and Wright in the summer of 2011, and again in the fall of 2011, and Vogt, in particular, was aware of Mattmiller—in particular Mattmiller’s—and Wright’s union positions.

The far more difficult issue is the central one: does the record demonstrate that anti-union animus was a reason—in whole or in part—for the failure to hire or consider Wright for the tool management supervisor position, or Mattmiller for the calibration specialist position.

As detailed above, there is certainly anti-union animus in the record on the part of the Respondent. However, there is also undeniable air of rank speculation around the General Counsel’s contention that anti-union animus motivated the decision in January to hire two incumbent employees for two jobs in the facility and not to hire or consider Mattmiller and Wright.

Contrary to the suggestion of the General Counsel, the record suggests that at MKM there was not a heated or aggressive culture of labor management relations (particularly at the shop level) that made Mattmiller or Wright stand out negatively to MKM management. Grievances were few and far between in 2010 and 2011, and many issues were settled without formal grievances after discussion between Mattmiller and supervisors or management. The distinction drawn by the General Counsel between Mattmiller and Wright on the one hand as aggressive union advocates, and Luther (who was hired by AMT) on the other hand as more “reluctant,” is overdrawn. Mattmiller did describe himself and Wright as more “forward” and Luther as more “reluctant.” But on the other hand, Wright testified that while he was more “high

⁶¹In general, cases involving a discriminatory failure to hire or a refusal to consider hire are governed by the Board’s decision in *FES*, 331 NLRB 9 (2000). *FES* supplements the *Wright Line* analysis by requiring that in addition to demonstrating the employer’s unlawful motivation, the General Counsel must establish (1) that the employer was hiring, or had concrete plans to hire; and (2) that the applicants had experience or training relevant to the position, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were pretextual. In *Planned Building*, the Board determined that a refusal to hire in a successorship context is analogous to a discriminatory discharge situation, and that there was no need to require the *FES* supplement as the predecessor’s employees presumptively meet the qualifications for hire and because the successor employer is necessarily hiring to fill vacant positions. Hence, the Board simply applies *Wright Line* in successorship situation.

However, the Respondent here argues that this refusal to hire case does not fit neatly into *FES* or *Planned Building*, as the General Counsel does not challenge the initial hiring decisions of AMT but only the specific failure to hire Mattmiller and Wright for two particular positions in January 2012. The Respondent contends (R. Br. at 56–57) that “this case is a hybrid of *FES* and *Planned Building*” and that the General Counsel should have to prove that the Respondent was hiring from outside the incumbent workforce and that Mattmiller and Wright met the requirements for jobs that the Respondent claims involved skills and functions in addition to those of the positions that Mattmiller and Wright performed for MKM.

I believe that the Respondent’s analysis carries some force. However, given my resolution of the case, I need not reach a conclusion on the Respondent’s contention that some hybrid of *FES* and *Wright Line* should apply. Even applying the *Wright Line* standard, I find that the General Counsel’s case is insufficient to prove the violations.

strung” and Luther more “laid back,” in terms of addressing issues that come up for union members with management there was “[r]eally not much difference” in their approach. It is notable that when the union stewards met with Vogt and Wiese for the first time in the summer of 2011, Luther was the only one to directly ask them about their views of unions. In any event, these are unremarkable distinctions and there is simply no meaningful evidence that Mattmiller and Wright were thought of negatively because of their union activity by people at MKM.⁶²

Other than the “greeting type” of meeting with Wiese and Vogt, Wright and Mattmiller had very little interaction with Wiese and Vogt. The exception to this is the incident, described above, when Vogt argued with the state safety inspector about having to pay the union representative—Mattmiller—to join in the safety inspection walkthrough. One does not have to condone Vogt’s imperious conduct to agree with the Respondent that Vogt’s ire was not directed at Mattmiller, but at the state safety inspector.

The only “union” comment made by the Respondent about Mattmiller or Wright was the reference to Mattmiller as “chief union steward” in Vogt’s assessment chart that ranked and commented on each MKM employee. Vogt contends that this was an innocent way for him to identify and remember who Mattmiller was. It’s possible, but few of the comments on other employees could be similarly construed as purely identifying remarks—most were opinions on the applicant, and most were negative. So I agree with the General Counsel that this is suspect, albeit not compelling evidence.

Beyond this, the General Counsel advances in support of its case the contention that the failure to consider or hire Mattmiller and Wright in January involved an elaborate and preconceived scheme by the Respondent, first, to not hire Wright and Mattmiller on December 5—using the pretext of hiring no one for their positions and the pretext of considering contracting out the gauge calibration work and reorganizing the tool crib operation. The Respondent then—again, as a pretext—claimed to be creating new positions with expanded duties that absorbed the work done by the tool crib operator and gauge calibration, even though the jobs were really quite similar to the work performed by Wright and Mattmiller and within their skills set. And chose Meredith and Kennedy to do these jobs and did not consider Wright and Mattmiller because of their union position and activities.

I cannot be sure that this did not happen. But I think the evidence that it did is lacking. It is a bit unusual to put it this way, but another factor that cannot go unmentioned is that the scheme envisioned by the General Counsel—pretending not to fill these two employees jobs for operational related reason, only to later pretend to create a new management position that absorbs the old job and filling it with an incumbent—strikes me as entirely too subtle for this Respondent.

This Respondent’s animus consists of open, angry denunciations of the Union (but not, it is to be noted, of individuals). Its unfair labor practices are blatant and announced. If intent on

⁶²In terms of such evidence, Wright recounted a remark Alexander made to him, nearly 20 years ago, just after Wright was elected steward, in which Alexander said, “congratulations, what’s that job going to pay you.” That sarcastic comment—if it is that—is far too remote in time to provide a basis for inferring animus against Wright. Other than that, Wright described Alexander as “a little more bossy, sassy, demanding” after he assumed union office in the early 1990s. In the final months before MKM closed Wright talked weekly with Alexander about problems with the overtime spread and Alexander (and other unnamed management officials) “acted like they didn’t care.” Mattmiller’s testimony contained no hint of conflict with management at MKM.

not hiring Mattmiller and Wright because of their union activity, it would have simply filled their spots with someone else from day one, relied upon Vogt's negative assessment, and moved on. It is hard for me to accept, as the General Counsel's theory requires, that this elaborate ruse was part of a scheme carried out over two months time.

Moreover, accepting the General Counsel's theory would require us to call into question—and perhaps, require the discrediting of the Respondent's witnesses—to an extent that, in my opinion, is not justifiable.

It is not just Vogt's testimony and his subjective assessment chart that must be untrue for the General Counsel's theory to be sustained. Alexander testified that on his own initiative he approached Kennedy and then went to Vogt and told him he had found in Kennedy the "ideal candidate" for the tool manager position that he and Vogt had discussed only generally. I found Alexander's enthusiasm for Kennedy to be genuine, as was his less than stellar opinion of Wright's work. This substantially bolsters the Respondent's nondiscriminatory explanation for how Kennedy and not Wright came to be chosen for the tooling position.

Similarly, Craig Meredith, noticing the vacant gauge calibration position took initiative to fill that gap and approached Mardegian seeking the work. Mardegian made the recommendation of Meredith and testified that he did not consider Mattmiller because of his observations and comments from the MKM quality manager about the state of the gauges under MKM.

Nothing in the demeanor of Meredith, Mardegian, Alexander, or the circumstances, leads me to discredit their uncontradicted testimony and I credit their accounts of the hiring process. This leaves a very unconvincing scenario for the General Counsel.

The problem, of course, is that the allegation advanced by the General Counsel is that it was the failure to consider or hire Wright and Mattmiller in January 2012, that is at issue. By that time one runs into the further complication that very few former MKM employees were hired after December 5, 2011—only 3 out of 34 hires through April 30, 2012, and 6 out of 82 hires through December 30, 2012, were former MKM employees. In other words *not* looking to the 26 former MKM employees who originally applied but were not hired to fill slots opening after December 5 was, by overwhelming numbers, very prevalent (and that assumes that all 6 former MKM employees hired by AMT through December 30, 2012 had applied initially with AMT). In this way of viewing it, an MKM employee *not* hired by AMT on December 5, had little chance of being hired subsequently. The nonhire of Mattmiller and Wright falls comfortably within this group of presumably non discriminatory nonhires.

In short, it is easy to understand the suspicion of a Respondent, such as this one, that went on—in the months after it began bargaining with the Union—to exhibit pronounced antiunion animus in its statements and conduct. However, when I consider the record as a whole, for all of the foregoing reasons I do not believe that the General Counsel has proven that antiunion animus, in whole or in part, motivated the Respondent to not hire or consider Mattmiller or Wright for the restructured positions it established in January 2012. And even assuming arguendo, that the General Counsel has proven that antiunion animus played a role in the decision, I would find that the Respondent has demonstrated that it would have taken same action—i.e., failed to hire or consider Mattmiller or Wright—for the positions it created in 2012. If there was unlawful conduct with regard to these two—and I do not believe it has been proven—it occurred the weekend of December 2–4, when the decision was made not to hire Wright or Mattmiller at AMT. By mid- and late-January 2012, the Respondent had moved on,

and worked with its incumbent workforce to make the changes to the gauge calibration and tool crib operations that it decided to implement. The case of unlawful discrimination against Mattmiller or Wright as to the January 2102 hirings is unproven. I will dismiss those allegations of the complaint.

CONCLUSIONS OF LAW

1. The Respondent Advanced Metal Technologies of Indiana, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), and Lodge 681 of the IAM (collectively Union), are labor organizations within the meaning of Section 2(5) of the Act representing the following appropriate unit of the Respondent's employees:

All employees of the Employer, excluding office clerical employees and all salaried employees within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

3. The Respondent violated Section 8(a)(1) of the Act, in early August 2012, by coercively interrogating employees who volunteered for a weekend crew about their union sympathies by asking them to declare whether they objected to the Respondent providing their name to the Union.

4. The Respondent violated Section 8(a)(1) of the Act by, on or about August 26, 2012, coercively interrogating an employee about whether he was going to attend a union meeting.

5. The Respondent violated Section 8(a)(1) of the Act by, in approximately April 2012, coercively interrogating an employee about whether he was going to attend a union meeting and subsequently about the attendance of other employees at the meeting.

6. The Respondent violated Section 8(a)(1) of the Act by, on or about August 28, 2012, telling employees during a bargaining meeting that they could not wear or display clothing that indicated support for the Union.

7. The Respondent violated Section 8(a)(1) of the Act by maintaining an unlawfully overbroad no-solicitation no-posting work rule from August 28, 2012, through November 27, 2012.

8. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about June 20, 2012, bypassing the Union and dealing directly with unit employees by soliciting suggestions from unit employees to alleviate overtime-related issues.

9. The Respondent violated Section 8(a)(1) and (5) of the Act, by unilaterally implementing changes to the following terms and conditions of employment which are mandatory subjects of bargaining, without prior notice to the Union and/or affording the Union an opportunity to bargain with respect to these matters without first bargaining to a valid bargaining impasse.

a. On or about January 5, 2012, discontinuing the practice of providing free coffee to employees.

b. On or about January 9, 2012, transferring the unit work of the tool crib operator to a position outside of the bargaining unit and eliminating the unit position of tool crib operator.

c. On or about January 30, 2012, transferring the unit work the gauge calibration technician to a position outside of the bargaining unit and eliminating the unit position of gauge calibration.

d. On or about March 1, 2012, implementing an attendance policy.

e. On a date unknown, between February and June 2012, removing the Union's bulletin board from the facility.

f. On or about June 1, 2012, making AFLAC insurance coverage available to employees.

g. On or about August 28, 2012, implementing a no-solicitation no-posting work rule that it rescinded November 27, 2012.

10. The Respondent violated Section 8(a)(1) and (5) of the Act since, on or about August 1, 2012, failing and refusing to furnish the Union with requested and relevant information regarding the names of unit employees who volunteered for a weekend work shift for which the Respondent had solicited volunteers.

11. The Respondent violated Section 8(a)(1) and (5) of the Act since, on or about August 31, 2012, failing and refusing to furnish the Union with requested and relevant health insurance information regarding coverage for the unit employees.

12. The Respondent violated Section 8(a)(1) and (5) by its overall conduct at various times between February 9 and September 20, 2012, by failing and refusing to bargain in good faith with the Union.

13. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Advanced Metal Technologies of Indiana, Inc., has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1) and (5) of the Act by implementing certain unlawful unilateral changes in terms and conditions of employment, the Respondent shall be ordered, upon the Union's request, to rescind those changes and restore the status quo ante, including its discontinuance of the practice of providing free coffee, its transfer of bargaining unit work out of the bargaining unit and elimination of bargaining unit positions, its removal of the union bulletin board, its implementation of the attendance policy, and the making available of AFLAC insurance coverage for employees. The record evidence demonstrates that the unlawfully implemented no-solicitation policy was rescinded on November

27, 2012. The Respondent will be required to make whole any bargaining unit employees for losses suffered as a result of the Respondent's unlawful actions. The make-whole remedy shall be computed in accordance with *Ogle Protective Services*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), or *F. W. Woolworth Co.*, 90 NLRB 289 (1950), as appropriate, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.⁶³

Having found that the Respondent failed and refused to furnish the Union with requested and relevant information, the Respondent shall be ordered to provide that information to the Union. To the extent any of the information, specifically, the MKM information, is not in the possession, custody, or control, of the Respondent, it shall be ordered make a good-faith effort to obtain it.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to collectively bargain with the Union as the collective-bargaining representative of an appropriate bargaining unit of employees (described above in the conclusions of law), the Respondent shall recognize and, upon request, bargain collectively with the Union as the bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

The General Counsel requests that the Respondent be ordered to bargain in good faith with the Union for a reasonable period of time as required by the Board in *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011).

In *UGL-UNICCO*, the Board established (or reestablished) the standard "successor bar" period in which a union is entitled to represent a successor's employees without challenge to its representative status. The Board explained that "we believe that the new [successor] 'bargaining relationship . . . rightfully established' through an employer's compliance with successorship requirements 'must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.'" *UGL-UNICCO*, slip op. at 6, quoting *Frank Bros. Co. v. NLRB*, 321 NLRB 702, 705 (1944). The Board held that where the successor has abided by its legal obligation to recognize an incumbent union

the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be

⁶³The make-whole provision will apply to the losses resulting from the discontinuance of free coffee, computed based on *Ogle Protection Services*, and more significantly, the losses attributable to the transfer out of the unit of bargaining unit work, i.e., the gauge calibration work and the tool crib work and elimination of the gauge calibration and took crib positions. The latter will be computed based on *Ogle Protective Services*, supra, to the extent any backpay owed did not involve loss of or failure to obtain employment status, and computed under *F. W. Woolworth Co.*, supra, to the extent the backpay involved an employee who lost or failed to obtain on account of the unlawful unilateral change. The identification of the individuals and the amounts owed are matters for compliance.

raised through an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.

5 *UGL-UNICCO Service Co.*, 357 NLRB at slip op. 8.

10 The Board went on to hold in *UGL-UNICCO*, that in the case where, as here, the successor availed itself of its right to establish initial terms and conditions, “the ‘reasonable period of bargaining’ will be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the employer.” *Id.*, slip op. at 9.

15 Thus, in this case, the Union was entitled to six to twelve months of bargaining during which there could be no challenge to its representation status. Obviously, the Respondent’s bad-faith bargaining intervened and denied the Union the opportunity for a six to twelve month period of lawfully-conducted bargaining. It is appropriate, in crafting a remedy for the Respondent’s bad-faith bargaining, to attempt to provide the Union with the opportunity that the Respondent’s unlawful conduct denied it. And it is appropriate not to provide the Respondent with an advantage from—or worse, an incentive for—its unlawful conduct.

20 In the analogous context of a newly certified union—entitled by statute to a 12 month “certification bar”—the Board’s “standard remedy where an employer’s unlawful conduct precludes appropriate bargaining with the union” is an extension of the certification period. *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992). *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Accurate Auditors*, 295 NLRB 1163, 1167 (1989) (“The law is settled that when an employer’s unfair labor practices intervene and prevents the employees’ certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer’s unfair labor practices”). That extension may be ordered in the context of a complete cessation of bargaining, but also where bargaining occurred in the face of unfair labor practices. See, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616 (1996) and *Accurate Auditors*, *supra* (failure to provide information provided basis for extension of certification year). As the Board observed in *Jar-Mac Poultry*, *supra* at 787, in concluding that the remedy should include an extension of the certification bar:

35 to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year.

40 That reasoning is also compelling here. As the Board explained in *UGL-UNICCO*, the successor bar vindicates some of the same statutory purposes as the certification bar. Like the certification bar, it is “based on the principle that ‘a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.’” *UGL-UNICCO*, slip op. at 1, quoting *Frank Bros.*, *supra*.

45 Here, the Respondent’s unfair labor practices have squandered the successor bar period, a period the Board has in essence, set aside and protected for good-faith bargaining. As detailed in the decision, the Respondent’s bargaining conduct from the outset was designed to undermine the Union, undermined the bargaining process, and was the opposite of the open-minded attempt to resolve differences envisioned by the Act. It is appropriate that the remedy

for the Respondent's unlawful conduct include an extension of this protected period, and the Respondent shall be ordered to bargain prospectively for a reasonable period as that term is defined in *UGL-UNICCO*.

5 Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

10 Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 9 of the Board
15 what action it will take with respect to this decision.

The General Counsel also seeks an order requiring that the Respondent have Wiese read the attached notice to employees, with a union representative present, and with any language that the Respondent uses to announce the notice reading approved by the Regional
20 Director. I agree that this is an appropriate case for the notice to be read to employees.

Contrary to the Respondent's contention, there is nothing punitive about this remedy. Rather, it insures that the Board's remedy is understood by employees, in the context of the Respondent's hostility to the Union and collective bargaining to which employees have been
25 exposed. The Respondent has committed serious unfair labor practices that involve conduct at odds with the meaningful collective-bargaining process in which it was legally obligated to participate. It widely broadcast its contempt for the process to employees. "Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future." *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 6 (2011). The Respondent's "campaign" in the facility against the Union was inextricably linked to most of the unfair labor practices found in this case. A reading to the employees assembled for that purpose only, on company time, will enable the employees to fully perceive that the Respondent and its managers are bound by the
35 requirements of the Act. *Federated Logistics*, 340 NLRB 255, 258 (2003), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). The "public reading of the notice is an effective but moderate way to let in a warning wind of information and, more important, reassurance." *McCallister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (internal citations omitted), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). It is also notable, and relevant, that Wiese has engaged in bargaining misconduct and other misconduct on behalf of Whitesell that has recently been found by the Board to require reading of a notice. *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5-6 (2011). He is not new to collective bargaining or, it seems, to bad-faith bargaining. He served as the Respondent's chief negotiator, chief communicator to employees, and top official at the plant. And he was personally and directly involved in many of the violations. Accordingly, the notice
45 must be read by Wiese, or, at the Respondent's option, by a Board agent in the presence of Wiese. The Board and union representatives will be provided the opportunity to be present to monitor the reading of the notice. *Texas Super Foods*, 303 NLRB 209, 220 (1991).⁶⁴

⁶⁴I reject the General Counsel's request to have the Regional Director approve Wiese's comments in advance. The presence of Board and Union representatives to monitor the reading should be sufficient to permit further enforcement action in the event that the

The General Counsel requests that the Respondent be ordered to reimburse the Union for the costs and expenses associated with bargaining for the period of February 9 through September 20, 2012.

The standard for determining whether negotiating costs should be awarded was set forth in *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part, 118 F.3d 795 (D.C. Cir. 1997):

[W]e do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. In cases of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

In this case, the Respondent's bad faith was unusually aggravated and did, indeed, "infect" the bargaining process at its core from the first bargaining session on February 9, 2011, until the last on September 20, 2012, when the Respondent brought negotiations to a complete halt with its bad faith insistence on tape recording the negotiations. As discussed at length in this decision, the Respondent's outrageous conduct at and away from the bargaining table stifled the possibility of an agreement. But, on top of this, as further discussed in the decision, the Respondent's conduct—at and away from the table—illegitimately sought to undermine the Union's status as the employees' representative. This emphasis could be seen at the bargaining table in its fixation on demands to see the Union's certification and for evidence of majority support, which undermined the bargaining. It could also be seen away from the table, in the vituperative attacks on the Union directed at employees. These attacks cast the Respondent in the role of employees' protector against the Union and disparaged the Union's role in the bargaining process. These tactics were designed to weaken the Union's bargaining and economic strength. The Union deserves relief from this undermining of its position. The premises of the Act and of collective bargaining were consistently challenged by the Respondent's conduct. It is reasonable to believe that, as a result of the Respondent's unlawful bargaining strategy, the Union is weaker than ever before in the eyes of employees, and, therefore, in the strength of its bargaining position. The Union's negotiating expenses were wasted in this process that—on account of the Respondent's unlawful conduct—undermined the Union's bargaining power. The Union should be made whole so that the order to bargain will be satisfied in circumstances more closely recreating the circumstances existing before the

Respondent's actions or statements undermine rather than satisfy the remedial purposes of this order.

Respondent began its unlawful campaign. An order for the Union to be reimbursed for negotiating expenses is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁵

ORDER

The Respondent Advanced Metal Technologies of Indiana, Inc., Jeffersonville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Coercively interrogating employees about their and other employees' union activities.

(b) Coercively interrogating employees about their union sympathies.

(c) Telling employees they cannot wear or display clothing that indicates support for the Union.

(d) Promulgating and maintaining an unlawfully overbroad rule restricting solicitation and postings.

(e) Bypassing the Union and directly dealing with unit employees by soliciting employee proposals for changes in terms and conditions of employment that are mandatory subjects of bargaining.

(f) Unilaterally implementing changes to terms and conditions of employment which are mandatory subjects of bargaining without prior notice and affording the Union an opportunity to bargain with respect to these matters and without first bargaining to a valid bargaining impasse.

(g) Failing and refusing to furnish information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of the unit employees.

(h) Failing and refusing to bargain collectively with the Union within the meaning of Section 8(a)(5) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with the Union for a reasonable period as set forth in the remedy

⁶⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

portion of this decision, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

5 All employees of the Employer, excluding office clerical employees and all salaried employees within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

10 (b) Upon request of the Union rescind and restore the status quo ante as to the unlawful unilateral changes implemented in mandatory subjects of bargaining, including the discontinuance of the practice of providing free coffee, the transfer of bargaining unit work out of the bargaining unit, the elimination of bargaining unit positions, the removal of the union bulletin board, the implementation of the attendance policy, and the making available of AFLAC insurance coverage for employees.

15 (c) Make bargaining unit employees whole for any losses they may have incurred as a result of the above-described unilateral changes plus interest, as described in the remedy portion of this decision.

20 (d) Pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations from February 9, 2012, through September 20, 2012, such costs and expenses to be determined at the compliance stage of this proceeding.

25 (e) Provide the Union with the unlawfully withheld information it requested on July 30, 2012, regarding the identities of the employees who volunteered for the weekend shift for which the Respondent solicited volunteers, and the unlawfully withheld information the Union first requested August 31, 2012, regarding the rates, schedule of benefits, deductibles and max out-of-pocket comparison from the old MKM policies to the current AMT employees. To the extent any of the information is not in the possession, custody, or control of the Respondent, the Respondent shall make a good-faith effort to obtain it.

30 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35 (g) Within 14 days after service by the Region, post at its Jeffersonville, Indiana facility, copies of the attached notice marked "Appendix."⁶⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered

⁶⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2012.

10 (h) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by Secretary Treasurer and Acting Business Manager Robert Wiese, or by a Board agent in the presence of Robert Wiese, and providing an opportunity for representatives of the Board and the Union to be present for the reading of the notice.

15 (i) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

20 Dated, Washington, D.C. September 11, 2013.

25

David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees of the Employer, excluding office clerical employees and all salaried employees within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

WE WILL NOT coercively interrogate you about your union activities or the union activities of other employees

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT tell you that you cannot wear or display clothing that indicates support for the Union.

WE WILL NOT promulgate or maintain an unlawfully overbroad rule restricting solicitation and postings.

WE WILL NOT bypass the Union and deal directly with employees seeking proposals for changes in terms and conditions of employment that are mandatory subjects of bargaining with the Union.

WE WILL NOT unilaterally implement changes to terms and conditions of employment which are mandatory subjects of bargaining with the Union, without providing the Union prior notice and an opportunity to bargain and without first bargaining to a valid impasse.

WE WILL NOT refuse to furnish the Union with requested and relevant information necessary for the Union to fulfill its role as the collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request of the Union bargain in good faith with the Union and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, upon request of the Union, rescind our unilateral changes implemented with regard to the discontinuance of the practice of providing free coffee, the rescinding of its transfer of bargaining unit work out of the bargaining unit and elimination of bargaining unit positions, the removal of the union bulletin board, the implementation of the attendance policy, and the making available of AFLAC insurance coverage for employees.

WE WILL make you whole, with interest, for any loss of earnings or other benefits you suffered as a result of the unlawful unilateral changes to terms and conditions of employment that we made.

WE WILL pay to the Union the costs and expenses incurred by it in the preparation and conduct of collective-bargaining negotiations from February 9, 2012, through September 20, 2012, which is the period of time we have been found to have bargained in bad faith.

WE WILL provide the Union with the unlawfully withheld information it requested regarding employees who volunteered for the weekend shift for which we solicited volunteers, and the health insurance information regarding our health insurance and the health insurance offered by MKM.

ADVANCED METAL TECHNOLOGIES OF
INDIANA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Building, Room 3003, Cincinnati, OH 45202-3271

(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (513) 684-3750.